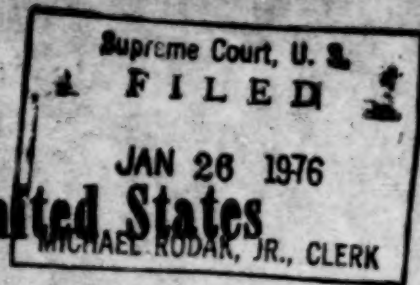


IN THE  
**Supreme Court of the United States**



October Term, 1975

No. ....**25-1053**

JOSEPH W. JONES, as Director of the County of Riverside,  
California, Department of Weights and Measures,  
*Petitioner,*

*vs.*

THE RATH PACKING COMPANY, a corporation,  
*Respondent.*

JOSEPH W. JONES, as Director of the County of Riverside,  
California, Department of Weights and Measures,  
*Petitioner,*

*vs.*

GENERAL MILLS, INC., a corporation; THE PILLSBURY  
COMPANY, a corporation; SEABOARD ALLIED MILLING  
CORPORATION, a corporation,  
*Respondents.*

**Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit.**

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JOSEPH W. JONES, as Director of the County of Riverside,  
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GENERAL MILLS, INC., a corporation; THE PILLSBURY  
COMPANY, a corporation; SEABOARD ALLIED MILLING  
CORPORATION, a corporation,  
*Respondents.*

**Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit.**

Petitioner Joseph W. Jones, as Director of the County of Riverside, California, Department of Weights and Measures, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered in each of the above-entitled proceedings on October 29, 1975. The two cases involve closely related questions, and accordingly petitioner is employing a single petition

for writ of certiorari covering both cases, in accordance with Rule 23(j) 5 of the Rules of this Court. The cases were consolidated by the Court of Appeals for oral argument. For convenience of expression, petitioner Joseph W. Jones, who is the petitioner in both cases, will hereafter be referred to as Jones; respondent, The Rath Packing Company, will be referred to as Rath; and respondents General Mills, Inc., *et al.*, will at times be referred to as the millers.<sup>1</sup>

<sup>1</sup>Concurrently herewith L. T. Wallace [successor to C. B. Christensen] as Director of Food and Agriculture of the State of California, and M. H. Becker as Director of the County of Los Angeles Department of Weights and Measures, are filing a petition for a writ of certiorari. The following business and farm organizations and government officers have authorized counsel for Petitioner Jones to advise the court that they support the filing of this Petition because of their concern as to the effect of the decisions of the court below.

*Business and Farm Organizations*

National Association of Retail Grocers of the United States, Inc., Oak Brook, Illinois  
Scale Manufacturers Association, Inc., Washington, D.C.  
California Cattlemen's Association, Sacramento, California  
Associated Milk Producers, Inc., San Antonio, Texas  
Mid-America Dairymen, Inc., Springfield, Missouri  
Milk Producers Council, Ontario, California  
Western Dairymen's Association, Merced, California  
Federated Dairymen, Merced, California  
Associated Dairymen, Lodi, California  
League of California Milk Producers, Sacramento, California  
Consumers Cooperative of Berkeley, Inc., Richmond, California

*Government Officers*

W. Michael Gillette, Solicitor General, State of Oregon  
Kenneth H. Leach, District Attorney, Butte County, California  
Noble Sprunger, County Counsel, El Dorado County, California  
Douglas J. Maloney, County Counsel, Marin County, California  
Bartley C. Williams, District Attorney, Yuba County, California  
Donald N. Stahl, District Attorney, Stanislaus County, California  
Edward F. Buckner, County Counsel, Sutter County, California  
Robert A. Rehberg, County Counsel, Shasta County, California  
Ted Hansen, District Attorney, Sutter County, California  
Stephen Dietrich, County Counsel, Tuolumne County, California  
Calvin E. Baldwin, County Counsel, Tulare County, California

**Opinions Below.**

The opinions of the Court of Appeals, not yet reported, appear in the Appendix, beginning at p. 1. The opinion of the United States District Court for the Central District of California in the *Rath* case is reported at 357 F.Supp. 529, Appendix, p. 57. The unreported Memorandum Opinion and Order of the District Court dated September 17, 1973, in the case of *General Mills, Inc., et al.*, appears in the Appendix, beginning at p. 53.

John K. Van de Kamp, District Attorney, Los Angeles County, California  
C. Stanley Trom, District Attorney, Ventura County, California  
Stanley M. Roden, District Attorney, Santa Barbara County, California  
Byron C. Morton, District Attorney, Riverside County, California  
Jay W. Powell, District Attorney, Tulare County, California  
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Albert M. Leddy, District Attorney, Kern County, California  
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Cecil Hicks, District Attorney, Orange County, California  
William A. Smith, District Attorney, Fresno County, California  
Robert W. Weir, District Attorney, Del Norte County, California  
James D. Boitano, District Attorney, Napa County, California  
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Joseph H. Baker, District Attorney, San Joaquin County, California  
Ronald L. MacMillen, District Attorney, Nevada County, California  
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Harold L. Abbott, District Attorney, Lassen County, California  
Thomas M. Kelly, District Attorney, Alpine County, California  
Gerald E. Flanagan, District Attorney, Plumas County, California  
Bruce B. Bales, District Attorney, Marin County, California

(This footnote is continued on next page)

### **Jurisdictional Grounds.**

Jurisdiction of this court is invoked pursuant to 28 U.S.C. section 1254(1), and Rule 22 of the Rules of this Court. The judgment of the Court of Appeals in each case was entered on October 29, 1975. This Petition was filed within 90 days of such date. There was no petition for rehearing in either case.

Jurisdiction of the United States District Court in each case was invoked under 28 U.S.C. sections 1331 (a) and 1332(a). In the *General Mills* case Jones also relied upon, for purposes of his counterclaim (in addition to the foregoing sections), 21 U.S.C. section 332 and the jurisdictional doctrine of pendent or ancillary administration. Jurisdiction of the Court of Appeals was invoked under 28 U.S.C. section 1291.

### **Question Presented.**

Whether enforcement provisions of the California statutes and regulations pertaining to accuracy of weights and measures are preempted by federal laws pursuant to Article 6, clause 2 of the Constitution of the United States.<sup>2</sup>

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Christopher C. Cottle, District Attorney, Santa Cruz County, California

D. Lowell Jensen, District Attorney, Alameda County, California

Duncan M. James, District Attorney, Mendocino County, California

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Edwin L. Miller, Jr., District Attorney, San Diego County, California

Ralph B. Jordan, District Attorney, Kern County, California

<sup>2</sup>Art. 6, Clause 2. Supreme Law of Land.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United

### **Constitution, Statutes and Regulations Involved.**

The relevant constitutional provisions, statutes and regulations are as follows:

#### **California.**

Business and Professions Code, section 12211, Stats. 1939, c. 43, p. 450, as amended Stats. 1949, c. 1384, p. 2407; Stats. 1957, c. 1658, p. 3038; Stats. 1963, c. 353;

4 California Administrative Code, Chapter 8, subchapter 2, Article 5 (Sometimes referred to in the text as "Article 5".)

#### **Federal.**

Constitution of the United States, Article 6, clause 2.

52 Stat. 1047, 21 U.S.C. section 343(a) and (e);

81 Stat. 584, 21 U.S.C. section 601(n)(1) and (5);

81 Stat. 600, 21 U.S.C. section 678;

9 Code of Federal Regulations, section 317.2 (h)(2), page 503;

21 Code of Federal Regulations, section 1.8b (q), page 17.

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States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.



### Statement of the Cases.

These cases arise under the Federal Wholesome Meat Act of 1967, the Federal Food, Drug, and Cosmetic Act, and the California Business and Professions Code, and involve provisions relating to the protection of the consumers, packagers and sellers of products. The subjects of the actions are short-weight packages of meat food products and wheat flour packed by the respective respondents. Upon inspection by Jones on a sampling of so-called "lots" of packages at the retail and wholesale levels, he ordered the lots "off sale" on the basis that the weights of the package contents did not conform to the weights stated on the package labels within the range of tolerances prescribed by California regulations.

The *Rath* case to date is a saga of parallel proceedings on identical issues in both the state and federal courts. The case of *General Mills, et al.*, was litigated only in the federal courts. The Director of Food & Agriculture of the State of California, acting through the California Attorney General, intervened on behalf of Jones in the *Rath* litigation.

In both cases the respondents contended that the California statutes and regulations were in conflict with, and preempted by, federal statutes dealing with packaged products misbranded as to labeled weight of package contents. The respondents sought declaratory relief and further sought to enjoin Jones from enforcing the California regulations through the process of ordering the merchandise off sale.

The Riverside Superior Court granted Jones' motion for summary judgment in the *Rath* case, and determined that enforcement of the California law and regulations was not preempted by the federal acts.

However, subsequently the United States District Court granted Rath's motion for summary judgment against Jones, 357 F.Supp. 529, Appendix, page 57, its decision on the preemption issue being diametrically opposed to that of the Riverside Superior Court.

In the *General Mills* case the United States District Court likewise found the state law on off sale procedures to be preempted by federal law, relying on its decision in the *Rath* case.

The United States Court of Appeals for the Ninth Circuit, in separate opinions filed on October 29, 1975, affirmed the judgments of the District Court on the preemption issue.

## REASONS FOR ALLOWANCE OF THE WRIT.

### I

#### THE PUBLIC IMPORTANCE OF THE ISSUE PRESENTED.

State jurisdiction over weights and measures in the market place is basic in the American law.

“If there be any subject over which it would seem the states ought to have plenary control, and the power to legislate in respect to which, it ought not to be supposed, was intended to be surrendered to the general government, it is the protection of the people against fraud and deception in the sale of food products.” *Plumley v. Massachusetts*, 155 U.S. 461, 472, 39 L.Ed. 223, 15 S.Ct. 154 (1894).

“[T]he supervision of the readying of foodstuffs for market has always been deemed a matter of peculiarly local concern.” *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 144, 10 L.Ed.2d 248, 83 S.Ct. 1210, reh.den., 374 U.S. 858 (1963).

In practice, the methods employed under the California weights and measures regulations and similar regulations followed in other states preserve the *single national standard of accuracy* needed for the protection of consumers, retailers and packagers. However, under the decisions of the Ninth Circuit the sound enforcement of weights and measures laws in the United States in accordance with a uniform standard becomes a practical impossibility.

The consumer is not the only one who loses from an ineffective weights and measures enforcement pro-

gram. Such law enforcement is equally important to wholesalers and retailers. They also buy in packages, although in larger units. The baker who buys a 50-pound sack of flour, or the butcher who buys a 50-pound box of ground beef, are each entitled to receive 50 pounds.

To compound the problem, the failure to police shortages effectively will hurt business itself because it will stifle fair competition. The packer or producer that shorts the most forces others to lower their standards to his standard or below, and then another process of shortages can be triggered. Moreover, there can be financial losses for farmers too because what the packer does not put into the package he does not buy from the farmer.

Obviously, these problems are not confined to California alone. They exist throughout the nation.

### II

#### THE DIRECT CONFLICT BETWEEN THE NINTH CIRCUIT'S DECISION IN THE GENERAL MILLS CASE AND THE SECOND CIRCUIT'S DECISION INVOLVING THE SAME MILLING COMPANIES, AND THE RAMIFICATIONS OF SUCH CONFLICT.

The decisions of the United States District Court in the case of *General Mills, Inc., et al. v. Betty Furness*, and the Memorandum Order of the Court of Appeals for the Second Circuit filed on January 10, 1975, are reproduced in the Appendix, beginning at p. 93.<sup>3</sup>

<sup>3</sup>*General Mills, Inc., The Pillsbury Company, Seaboard Allied Milling Corporation v. Betty Furness, Commissioner, Department of Consumer Affairs, City of New York*, U.S. District Court,



The ordinance challenged by the milling companies in New York was Section 833-16.0 of the Administrative Code of the City of New York which provided in pertinent part:

"It shall be unlawful to sell or offer for sale any commodity or article of merchandise, at or for a greater weight or measure than the true weight or measure thereof. . ."

The District Court ruled that the ordinance as applied in accordance with Handbook 67 of the National Bureau of Standards, United States Department of Commerce, did permit reasonable weight variations, that there was no irreconcilable conflict between local and federal law, and that, therefore, the New York ordinance was not preempted by federal law. Its determination was affirmed on appeal to the Second Circuit.

Handbook 67 employed by the Department of Consumer Affairs of the City of New York is substantially similar to the California weights and measures regulations, the so-called Article 5, Appendix, p. 70, invalidated by the Ninth Circuit. It is a model code of the National Bureau of Standards. The court may take judicial notice that all of the states either have adopted Handbook 67 as a part of their weights and measures laws or have laws and regulations authorizing [as does California] the use of lot sampling plans comparable to the lot sampling plan of Handbook 67.

The first Model Law, as such, was formally adopted by the Conference on Weights and Measures in 1911. "Through the years, almost without exception, each State has relied upon the Model Law at the time they

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So. Dist. N.Y., 73 Civ. 2497, orders filed February 25, 1974, and July 3, 1974; affirmed, U.S. Court of Appeals for Second Circuit, 508 F.2d 836, January 10, 1975.

[sic] first enacted comprehensive weights and measures legislation. This has led to a great degree of uniformity in the basic weights and measures requirements throughout the country." Foreword to the Model State Weights and Measures Law 1973 as adopted by the National Conference on Weights and Measures published by United States Department of Commerce, National Bureau of Standards, 1973.

Handbook 67 could be invalidated by the decisions in the cases at bar because of the following factors (all of which are present in California's Article 5):

(1) It allows examinations of lots instead of only single packages; (2) it sets numerical limits on the overpacking and underpacking of individual packages in a lot; (3) it requires an *average* net weight or measure *per lot*; (4) it allows larger amounts of overpacking for hygroscopic products (products which may gain or lose moisture) so they will average net weight by lot at time of sale. [By comparison, under the federal "standard" as interpreted by the Ninth Circuit each individual package must be judged separately and a "reasonable" amount of shortage allowed.] Accordingly, if, by a parity of reasoning, the laws and regulations of states employing Handbook 67 become unenforceable for reasons applied by the Ninth Circuit to California's Article 5, there will be shortages in the marketplace in a large part of America.

Foreign packed packages would likewise be subject only to the "reasonable variations" test of the federal regulations as interpreted by the Ninth Circuit. Policing efforts are difficult enough when applied to domestic products. The Ninth Circuit's "reasonable variations" test would become virtually impossible of application when applied to packages packed in foreign lands.



The efforts of the millers to frustrate state inspection were rejected in New York but not in California. The Second and Ninth Federal Circuits are in direct conflict.

### III

#### THE CONFLICT BETWEEN THE NINTH CIRCUIT'S DECISIONS AND DECISIONS OF THIS COURT ON CONSTITUTIONAL PRINCIPLES.

##### 1. Concurrent Jurisdiction of the Federal and State Governments.

21 U.S.C. section 678, Appendix, page 91, provides in relevant part as follows [this is part of the Federal Wholesome Meat Act]:

“... Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State or Territory or the District of Columbia with respect to articles prepared at any establishment under inspection in accordance with the requirements under subchapter I of this chapter, but *any State* or Territory or the District of Columbia may, consistent with the requirements under this chapter, exercise concurrent jurisdiction with the Secretary over articles required to be inspected under said subchapter I, for the purpose of preventing the distribution for human food purposes of any such *articles which are adulterated or misbranded* and are outside of such an establishment, . . .” [Emphasis added].

A meat food product is “misbranded” if the label statement as to package contents is “false or misleading.” 21 U.S.C. section 601(n)(1) [see also 21 U.S.C. section 343(a)]. Short-weighting is misbranding. 21 U.S.C. section 601(n)(5) [see also 21 U.S.C. section

343(e)]. Misbranding can be determined only after examining and comparing the representations on the label with the package contents.

If, as indicated by the Ninth Circuit,<sup>4</sup> there is no substantial difference between “labeling,” as used in the first part of section 678, *supra*, and “misbranding,” then the provisions of section 678 which speak of “articles which are adulterated and misbranded” are indeed redundant. Congress must not, however, be presumed to have performed an idle act in delineating the respective jurisdictional areas of the state and federal governments. Under the above quoted terms of section 678 the states and the Secretary of Agriculture have *concurrent jurisdiction* to prevent the distribution of *misbranded* meat food packages, which would include packages misbranded as to weight. The Secretary has *controlling jurisdiction* to regulate the *labeling* of packages. Both federal and state statutes recognize this controlling jurisdiction of the federal government with regard to labeling.<sup>5</sup>

<sup>4</sup>Footnote 25, Appendix, p. 28, and footnote 3, Appendix, p. 45.

<sup>5</sup>Pub.L. 89-755, §12 (1966), 30 Stat. 1302, 15 U.S.C. section 1461 [Federal Fair Packaging and Labeling Act]. “*Effect on State Law*. It is hereby declared that it is the express intent of Congress to supersede any and all laws of the States or political subdivisions thereof insofar as they may now or hereafter provide for the labeling of the net quantity of contents of the package of any consumer commodity covered by this chapter which are less stringent than or require information different from the requirements of section 1453 of this title or regulations promulgated pursuant thereto.”

Under the Savings Provisions of 15 U.S.C. section 1460, compliance with the Food, Drug, and Cosmetic Act is to be considered compliance with the Fair Packaging and Labeling Act.

California Business and Professions Code section 12613 [California Fair Packaging and Labeling Act]:

(This footnote is continued on next page)

Jones, as an officer enforcing state laws, has not told Rath or the milling companies what kinds of labels to put on their packages of bacon or flour, nor what to say on the labels, nor what the sizes, styles, or patterns of the labels should be, as distinct from maintaining accuracy of contents. All that he required in effect was that the label be not false, misleading or deceptive to the consumer in its statement of the net weight of the product to which the label was attached. *Jones merely enforces the legitimate interest of the state in ensuring that the consumer gets the product quantity represented to him by the package label.* The following language of California Business and Professions Code section 12211, which has been invalidated by the lower court, speaks not of labeling. It is not a part of the California Fair Packaging and Labeling Act. Its emphasis is upon *removal from the marketplace* of any package containing "a less amount than that represented":

"Whenever a lot or package of any commodity is found to contain, through the procedures authorized herein, *a less amount than that represented*, the sealer shall in writing order same off sale and require that an accurate statement of quantity be placed on each such package or container

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"Provisions less stringent or requiring information different from federal act inoperative

"If any provision of this chapter is less stringent or requires information different from any requirement of Section 4 of the act of Congress entitled 'Fair Packaging and Labeling Act' (P.L. 89-755; 80 Stat. 1296; 15 U.S.C. 1451-1461)<sup>1</sup> or of any regulation promulgated pursuant to such act, the provision shall be inoperative to the extent that it is less stringent or requires information different from any such federal requirement, in which event each such federal requirement, is a part of this chapter."

before same may be released for sale by the sealer in writing. The sealer may seize as evidence any package or container which is found to contain *a less amount than that represented.*" [Emphasis added.]

## 2. Concurrent "Powers" of the Federal and State Governments.

### (a) The Prohibition Cases.

A substantial body of case law that sheds light on the scope of federal and state authority where a traditional police power of the state becomes concurrent with a power of the federal government, was developed during the so-called Prohibition Era of the 18th Amendment and the Volstead Act, 41 Stat. at L.305, Ch. 83, Acts 66th Cong. 1st Sess. As in the case of foodstuffs, the regulation of the traffic in liquor has long been a traditional police power of the states. *Vigliotti v. Pennsylvania*, 258 U.S. 403, 66 L.Ed. 686, 42 S.Ct. 330 (1921); *United States v. Lanza*, 260 U.S. 377, 67 L.Ed. 314, 43 S.Ct. 141 (1922). The text of the 18th Amendment was as follows:

"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Section 2. The Congress and the several states shall have *concurrent power* to enforce this article by appropriate legislation." [Emphasis added.]



Section 2 of the 18th Amendment spoke of *concurrent* "power" of the Congress and the several states, whereas the language of 21 U.S.C. section 678 is *concurrent* "jurisdiction." It is reasonable to treat the two terms as synonymous.

The word "jurisdiction" has been defined to be, among other things, the "power to declare and enforce the law," 50 C.J.S. 1091. The term "concurrent powers" has been defined as political powers exercised independently in the same field of legislation by both federal and state governments. 8 *Words and Phrases*, 608 *et seq.*<sup>6</sup> A "concurrent power excludes the idea of a dependent power. . . ." Mr. Justice McLean in the *Passenger Cases*, 7 How. 283, 399, 12 L.Ed. 702, 750 (1849).

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<sup>6</sup>A prime example of an area of operations in which the federal and state governments have concurrent jurisdiction (concurrent powers) is that of taxation. The taxing power of a state is one of its attributes of sovereignty. It exists independently of the Constitution of the United States, and may be exercised to an unlimited extent, except so far as it has been surrendered to the federal government. *Union Pacific R.R. Co. v. Peniston*, 18 Wall. 5, 21 L.Ed. 787 (1873). In *M'Culloch v. Maryland*, 4 Wheat. 316, 425, 4 L.Ed. 579, 606 (1819), Chief Justice Marshall stated: "That the power of taxation is one of vital importance; that it is retained by the states; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be *concurrently exercised by the two governments*; are truths which have never been denied." [Emphasis added.]

The general principle as to the right of the states to exercise the power of effective legislation concerning subjects over which Congress also has power was stated by this court in *Gilman v. Philadelphia*, 3 Wall. 713, 730, 18 L.Ed., 96, 101 (1865) [summarizing language of Mr. Justice Story in *Houston v. Moore*, 5 Wheat. 1, 49, 5 L.Ed. 19, 30 (1820)]: "The states may exercise concurrent or independent power in all cases but three: (1) Where the power is lodged

In *Wedding v. Meyler*, 192 U.S. 573, 24 S.Ct. 322, 48 L.Ed. 570, 66 L.R.A. 833 (1903), and in *Nielsen v. Oregon*, 212 U.S. 315, 29 S.Ct. 383, 53 L.Ed. 528 (1908), "Concurrent jurisdiction" was given respectively to Kentucky and Indiana over the Ohio River by the Virginia Compact, and respectively to Washington and Oregon over the Columbia River by Act of Congress. It was decided that such concurrent jurisdiction conferred equality of powers, and that neither state could override the legislation of the other.

The nature of the respective powers of the state and federal governments to regulate at the local level was outlined by Mr. Justice Taft in *United States v. Lanza, supra*, 260 U.S. 377. The court stated that although the second section of the 18th Amendment meant that Congress had the power to take legislative measures to make the policy of the amendment effective, at the same time the like power of the states within their territorial limits "*shall not cease to exist.*" 260 U.S. at page 381.

"Each state, as also Congress," stated the court, "may exercise an independent judgment in selecting and shaping measures to enforce prohibition. Such as are adopted by Congress become laws of the United States, and such as are adopted by a state become laws of that state. *They may vary in many particulars, including the penalties prescribed*, but this is an inseparable incident of independent legislative action in distinct jurisdictions." [Emphasis added.] 260 U.S. at page 381.

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exclusively in the Federal Constitution. (2) Where it is given to the United States and prohibited to the states. (3) Where, from the nature and subjects of the power, it must necessarily be exercised by the national government exclusively."



In stressing that the power of the states to enforce prohibition did not originate in the 18th Amendment the court stated:

"To regard the Amendment as the source of the power of the states to adopt and enforce prohibition measures is to take a partial and erroneous view of the matter. Save for some restrictions arising out of the Federal Constitution, chiefly the commerce clause, *each state possessed that power in full measure prior to the Amendment*, and the probable purpose of declaring a concurrent power to be in the states was to negative any possible inference that, in vesting the national government with the power of countrywide prohibition, state power would be excluded . . ." [Emphasis added.] 260 U.S. at page 381.<sup>7</sup>

To paraphrase the foregoing language in *Lanza*, the probable purpose of declaring, in 21 U.S.C. section 678, that the states should be vested with concurrent jurisdiction at the distribution level to prevent the misbranding of packages of meat, was to "negative any possible inference" that state power [which existed long before the Federal Wholesome Meat Act] would be excluded.

**(b) Concurrent Powers to Protect Against Adulteration and Misbranding.**

**(1) *The Rath Case.***

There is an obvious parallel between the concurrent jurisdiction of the states to deal with the problems

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<sup>7</sup>Regardless of whether the criminal law principle with respect to double jeopardy established in the *Lanza* case

of adulteration and misbranding of meat food products, as provided in 21 U.S.C. section 678, and the states' concurrent powers relating to liquor prohibition. If the supremacy of the federal government in dealing with adulteration and misbranding had been intended, thereby subordinating the longstanding police power of the states, it would have been directly declared in section 678, just as it was declared as to "marking, labeling, packaging, and ingredient requirements." The Congress had the whole vocabulary of the English language to draw upon in shaping the terminology of section 678.

The court below in its *Rath* decision has converted a function traditionally and historically exercised by the states into a form of impotence, not of power. A function has become in effect a nonfunction. The term "concurrent jurisdiction" as it appears in the statute has been denuded of any practical meaning. The *Rath* decision accordingly is contrary to the decisions of this court.

**(2) *The General Mills Case.***

Section 678 has no counterpart in the Federal Food, Drug and Cosmetic Act. Nevertheless, the Court of Appeals in its *General Mills* opinion found in effect that state law, namely, Business and Professions Code section 12211, Appendix, p. 69 was preempted by federal law. This section authorizes the county sealer [such as Jones] to weigh or measure packages to determine whether they "contain the quantity or amount represented . . ." The state Director of Food and

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is followed by the courts today [see 1 Witkin, Crimes 195], the general proposition relating to state sovereignty vis-a-vis the sovereignty of the federal government reaffirmed by the court remains as a basic rule of modern jurisprudence.

Agriculture is authorized by such statute to adopt regulations governing the weighing and measuring procedures, and the county sealer may order off sale a lot of any commodity "found to contain . . . a less amount than that represented . . ." The court also invalidated Article 5, Appendix, page 70, of the California Administrative Code, the regulation adopted under the authority of section 12211. It ruled that there was an "impermissible conflict" between the foregoing California statutory and regulatory provisions and the Federal Food, Drug and Cosmetic Act, particularly 21 U.S.C. section 343(e), Appendix, pages 90-91, and the Federal Fair Packaging and Labeling Act, *supra*, pages 13-14, footnote 5.<sup>8</sup>

The provisions of 21 U.S.C. section 343(e) must be read in conjunction with its interpretive regulation, 21 C.F.R. 1.8b(q), Appendix, page 92. Together they provide that a food package is deemed to be "misbranded" unless it bears a label containing an accurate statement as to weight or measure, provided that "reasonable variations" caused by gain or loss of moisture during the course of good distribution practice or by unavoidable deviations in good manufacturing practice will be recognized. If preemption exists, then, according to the reasoning in the *General Mills* opinion, corresponding identical sections of the

<sup>8</sup>As discussed, *supra* (page 13), there is no labeling problem in these cases within the scope of the federal and state labeling statutes. It was an error for the court below to import the state and federal labeling acts into the case in arriving at its determination of an impermissible conflict between state and federal law in the enforcement of accuracy of contents.

Federal Wholesome Meat Act and its interpretive regulations are also preemptive of state law. 21 U.S.C. section 601(n)(5); 9 C.F.R. section 317.2(h)(2), Appendix, pages 91 and 93.

The problem in the *General Mills* case is not in a conflict between state and federal laws and regulations. Rather the problem is in the lower court's *interpretation* of the federal laws and regulations. The court's concept of the federal standard is that it relates to the accuracy of the contents of *packages*, and that it is applied on a product-by-product basis and on a packaging plant-by-packaging plant basis. This interpretation perforce means that the federal standard must vary depending upon the product involved. For example, the criteria applied to packages of spaghetti in determining "reasonable variations" will differ from those applied to canned dog food. The factors would vary also according to whether the product is hygroscopic or non-hygroscopic. Moreover, the factors to be considered would vary if the packaging plant were located, say, in El Paso, Texas, rather than Tokyo, Japan, or if the product were being shipped to Riverside, California rather than Minneapolis, Minnesota.

Contrasted with the foregoing standard as conceived by the Court of Appeals is the standard of Handbook 67 of the National Bureau of Standards, *supra*, page 10. As earlier stated, the systems employed by Handbook 67 and California's Article 5 follow the same concepts, both using a statistical sampling to determine the accuracy of the particular *lot* being checked. The



same procedure applies to all packaged commodities. The handbook is intended as a procedural guide for legal control of prepacked goods by federal, state, and local regulatory officials.

Under both Article 5 of the California regulations and Handbook 67 the weight or measure of the *lot* examined by the inspectors on a sampling basis must equal the *average* net weight or measure of the packages in the lot at the time of inspection. The inspectors determine whether the average of underweight and overweight packages is within a range of reasonable tolerances of accurate weight. Numerical limits are applied from a table of tolerances regardless of where packed or the type of commodity in the packages. A packer that meets the standards of accuracy of California meets the standard of every other state and every federal agency using the principles adopted by the Secretary of Commerce in Handbook 67.

Under the Ninth Circuit's interpretation there would be variations differing from product to product over thousands of products together with differences in hygroscopic products arising from a myriad of different and widespread packing locations. Foreign competitors in hygroscopic products would have an advantage over American competitors in that foreign products could be more short weight than domestic products because of longer distances for distribution. Moreover, manufacturers with inefficient filling capabilities would have a competitive advantage over companies having more accurate systems.

To accept the interpretation of the Ninth Circuit would be to dilute a standard of uniformity, *i.e.*, accuracy, among the states, into a myriad of standards throughout the land.

The methods employed under Article 5 and Handbook 67 preserve the *single national standard of accuracy* needed for the protection of consumers, retailers, and packagers.

This court stated in *Florida Lime and Avocado Growers, Inc. v. Paul, supra*, 373 U.S. 132, that federal regulation of a field of commerce should not be preemptive of state regulatory power in the absence of persuasive reasons—either [1] that the nature of the regulated subject matter permits no other conclusion, or [2] that the Congress has unmistakably so ordained, 373 U.S. 132, 142. We submit that *Congress has not "so ordained" by the simple terminology of 21 U.S.C. sections 343(e) and 601(n)(5).*

It is a basic proposition that conflicts between state and federal regulations are not to be sought where none exists. *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 4 L.Ed.2d 852, 80 S.Ct. 813, 78 A.L.R.2d 1294 (1960). Whenever the federal power is exerted within what would otherwise be the domain of state power, the justification for its exercise must clearly appear. *Florida v. United States*, 282 U.S. 194, 75 L.Ed. 291, 51 S.Ct. 119 (1930). It will not be held that a federal statute was intended to supersede the exercise of the power of the state, unless there

is clear manifestation of intention, since the exercise of federal supremacy is not lightly to be presumed. *Schwartz v. Texas*, 344 U.S. 199, 97 L.Ed. 231, 73 S.Ct. 232 (1952).

#### Summary and Conclusion.

The decisions below eliminate a single standard based on lot sampling and statistical concepts and substitute an unenforceable assortment of undefined shortages determined on a package-by-package basis. The New York federal courts in *General Mills v. Furness* denied such an unenforceable standard.

Properly interpreted, California's law and the laws of the states that apply the principles of Handbook 67 are in accord with the federal standard as it was meant to be, not as it was interpreted by the Ninth Circuit. There is no conflict.

No preemption was intended by any of the federal acts as to the *quantity of contents*. The only preemption intended was as to the *format of labeling* and the *placement of labeling* on packages. As to such requirements, California is in accord with federal laws.

In short, the federal and state acts have long been in harmony. California's law is a part of a uniform system. The expressed intent of Congress to *enhance* consumer protection belies any congressional intent to destroy a national system of label accuracy and replace it with an unenforceable system.

Regulating weights and measures is "one of the oldest exercises of governmental regulatory power." *Swift and Co. v. Wickham*, 230 F.Supp. 398, 402 (S.D.N.Y. 1964); affirmed 364 F.2d 241 (2d Cir. 1966); cert. den. 385 U.S. 1036 (1967). In the enactment of the federal acts involved in these proceedings Congress has not taken such regulatory power away from the states.

We respectfully submit that the Petition should be granted.

Dated: January 23, 1976.

RAY T. SULLIVAN, JR.,  
County Counsel,  
Riverside County, California,

LOYAL E. KEIR,  
Deputy County Counsel,

Counsel for Petitioner, Joseph W. Jones,  
Director of Department of Weights and  
Measures, County of Riverside, California.

(CORRECTED)

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

THE RATH PACKING COMPANY,  
a corporation,  
*Plaintiff, Counter-Defendant and Appellant,*

vs.

M. H. BECKER as Director of the County  
of Los Angeles Department of Weights  
and Measures,  
*Defendant, Appellee and Cross-Appellant.*

Nos. 73-2481

73-2482

73-3092

C. B. CHRISTENSEN as Director of Agriculture  
of the State of California,  
*Intervenor, Appellee and Cross-Appellant.*

THE RATH PACKING COMPANY,  
a corporation,  
*Plaintiff and Appellant,*

vs.

JOSEPH W. JONES as Director of the County  
of Riverside Department of Weights  
and Measures,  
*Defendant, Appellee and Cross-Appellant.*

Nos. 73-2496

73-3180

OPINION

[October 29, 1975]

Appeal from the United States District Court  
for the Central District of California

Before: BROWNING and TRASK, Circuit Judges,  
and RICH, Judge.\*

RICH, Judge:

These suits were brought by Rath Packing Company (herein-  
after "Rath") to enjoin the enforcement of certain California  
statutes and regulations pertaining to the labeling by weight of

\*The Honorable Giles S. Rich, Judge, United States Court of Customs  
and Patent Appeals, sitting by designation.



packaged foods at retail, and for a declaration that the federal Wholesome Meat Act of 1967, 21 USC, §601 et seq., and a regulation promulgated thereunder, 9 CFR 317.2(h) (2), preempt these California statutes and regulations. They were consolidated for decision in the district court and on appeal.

Rath is a nation-wide processor and seller of meat products, including bacon, and maintains a meat-packing establishment at Vernon, California, which is subject to federal inspection under the Wholesome Meat Act and 9 CFR 302.1 as an establishment in which "any products of . . . carcasses of livestock are . . . prepared for transportation or sale as articles of commerce, which are intended for use as human food." Becker and Jones are the Directors of the Departments of Weights and Measures of Los Angeles and Riverside Counties, California, respectively. They are responsible for the actual enforcement of the State weights and measures laws in their counties. Intervenor Christensen is the Director of Agriculture of the State of California.

Jurisdiction in the district court was based on 28 USC, §1331(a), as it was alleged that a case or controversy arising under the laws of the United States involving more than \$10,000 was presented.<sup>1</sup> We have jurisdiction of this appeal under 28 USC, §1291.

The district court, in a memorandum and order reported at 357 F. Supp. 529 (C.D. Cal. 1973), granted in part the relief requested, and all parties appealed the determinations adverse to them.

This case is a companion to *General Mills, Inc., et al. v. Jones*, Nos. 73-3583 and 74-1051, decided concurrently herewith. Much of the discussion in this opinion is applicable to the *General Mills* case as well.

#### Background

This case concerns the packaging and weighing of bacon. In order to understand the issues, a brief description of the properties of bacon and how it is packed and weighed is necessary.

The weighing and packaging of bacon at the Rath plant takes place under internal Rath procedures which have been submitted to an official of the United States Department of Agriculture (USDA). After the pickled and smoked pork bellies come from

<sup>1</sup>It is not disputed that the jurisdictional amount is present.

the bacon press, where they are squared into uniform rectangular shapes, they are sliced by a machine, which distributes the slices in "drafts" of approximately one pound weight. An operator places each draft on an insert, or "tux", board, which is a hardboard coated either with wax or with polyethylene.<sup>2</sup> The drafts are then passed to a scaling station, where they are weighed and the operator either adds or removes bacon to bring the weight within a predetermined target limit. After scaling the bacon is passed to a tux overwrap machine, which inserts the bacon into a carton and seals it. This carton is not hermetically sealed and the bacon in it does lose some moisture to the atmosphere over time. Although Rath now does use some hermetically sealed bacon containers, this packing method is agreed to be in accordance with good distribution practices. Once the bacon is weighed at the scaling station, it is not weighed again before it leaves the Rath plant, an average of 4 days, never more than 8 or 9 days, later. In determining the pass zone Rath follows the USDA procedure of subtracting from the actual weight of the draft and the tux board on which it lies the weight of a dry tux board. This method uses a "dry tare."<sup>3</sup> There is no evidence that Rath has violated federal weight standards in any way.

The federal program for regulation of net weight labeling of meat and meat food products exists in part under the Wholesome Meat Act of 1967, *supra*. The Act added the concept of "misbranding" to the prior federal meat inspection laws. 21 USC §601(n) provides in relevant part:

(n) The term "misbranded" shall apply to any carcass, part thereof, meat or meat food product under one or more of the following circumstances:

• • • •

(5) if in a package or other container unless it bears a label showing (A) the name and place of business of the manufacturer, packer, or distributor; and (B) an accurate

<sup>2</sup>The polyethylene-coated boards have absorbed 4/16 oz. less of bacon moisture and grease than the wax-coated board 4 days after pack. The saturation point of waxed board is reached 6 to 9 days after pack; about 5/16 oz. is absorbed.

<sup>3</sup>"Tare. . . 1a: the weight of a container or vehicle that is deducted from the gross weight to obtain the net weight." *Webster's Third New International Dictionary* 2341 (1971).

statement of the quantity of the contents in terms of weight, measure, or numerical count: *Provided*, That under clause (B) of this subparagraph (5), reasonable variations may be permitted, and exemptions as to small packages may be established, by regulations prescribed by the Secretary [of Agriculture];

• • • • •

In 9 CFR 317.2(h)(2) the Secretary purported to implement §601(n)(5):

(2) The statement as it is shown on a label shall not be false or misleading and shall express an accurate statement of the quantity of contents of the container exclusive of wrappers and packing substances. Reasonable variations caused by loss or gain of moisture during the course of good distribution practices or by unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large.

In the supermarket the California inspectors employed a different weighing method, using a "wet tare."<sup>4</sup> The California procedure is set forth in detail in 4 Cal. Admin. Code ch. 8, subch. 2, Art. 5. Briefly, the California inspectors follow a twelve-step procedure set forth in Section 2933.3 of the regulations:

- (1) determine the number of packages in the lot to be sampled;
- (2) from a table in the regulation, determine the total package sample size (e.g., 15 packages out of a lot of 300);
- (3) from the same table, determine the tare sample size (e.g., 2 packages out of a lot of 300);
- (4) record the gross weight of each tare sample package;
- (5) remove the usable contents from each tare sample, weigh the used, empty container, and compute the average tare weight;<sup>5</sup>

<sup>4</sup>The difference in tares employed is not an issue in this case.

<sup>5</sup>The container and tax board are weighed with all matter adhering to the tare that does not pull off when the bacon is removed included, as well as with any grease or moisture that the tax board may have absorbed from the bacon. This is "wet tare."

(6) weigh the remaining packages in the package sample and record their weights, determining the amount of error from labeled weight for each package;

(7) [not applicable to bacon];

(8) calculate the preliminary total error for the sample, and determine the arithmetical average error;

(9) calculate the range of error for each sub-group of the package sample;

(10) determine whether any unreasonable errors exist, and eliminate from further computations all samples whose errors exceed the preliminary average error in underweight situations by more than the amounts set forth in tables in the regulations; if the number of unreasonable errors exceeds a certain set figure for each sample size, further action, including the issuance of off-sale orders, may be undertaken.

(11) recalculate the total and average error of the sample excluding the unreasonable errors;

(12) "(a) If the total error as obtained from the sample is plus and is less than the value shown in Table III for the corresponding range and sample size, then a shortage may or may not exist, and additional samples may or may not be taken, depending upon the discretion of the weights and measures official. If no additional samples are taken then the procedures as set forth in the following sections shall govern the disposition of the lot.

"(b) If the total error obtained from the sample is less than the above-determined value, and the error is minus, then a shortage may or may not exist, and additional samples may or may not be taken, depending upon the discretion of the weights and measures official. If no additional samples are taken the lot shall be passed. If additional samples are taken then the procedures as set forth in the following sections shall govern the disposition of the lot." [Sec. 2933.3.12.]

If an inspector cannot pass the lot based on this sampling technique or after retesting, he then may order the lot off-sale under the provisions of California Business and Professions Code §12211:



Each sealer shall, from time to time, weigh or measure packages, containers or amounts of commodities sold, or in the process of delivery, in order to determine whether the same contain the quantity or amount represented and whether they are being sold in accordance with law.

• • • • •

Whenever a lot or package of any commodity is found to contain, through the procedures authorized herein, a less amount than that represented, the sealer shall in writing order same off sale and require that an accurate statement of quantity be placed on each such package or container before the same may be released for sale by the sealer in writing. The sealer may seize as evidence any package or container which is found to contain a less amount than that represented.

Evidence was adduced at the trial from various California officials, including Becker, that the county departments do not recognize variations in net weight that result from water loss during good distribution practice. Mr. Cervinka, a statistician employed by the California Department of Agriculture, testified on direct examination as an expert for Christensen that Art. 5 of the regulation, described above, is a statistically valid procedure. On cross-examination he indicated that Art. 5 does not make any distinction between products that lose water and those that do not, nor does it make provision for any weight reductions during the course of handling. On this and other evidence the district court concluded that Art. 5 uses "absolute" weight as determined by statistical methods as its measure of compliance and makes no reference in describing the steps of the weighing and calculating process to reasonable variations from label weight caused by "loss • • • of moisture during the course of good distribution practice." The district court's fact findings have substantial evidentiary support and are not clearly erroneous. F.R.Civ.P. 52(a). Becker, Christensen, and Jones do not urge error in the district court's construction of Art. 5.

#### *Procedural History*

During the period September 1971 to March 1972 inspectors under the supervision of Becker and Jones visited supermarkets in Los Angeles and Riverside Counties and weighed packages of Rath bacon to determine compliance with the State statute and

regulations concerning net weight labeling. Becker's representatives ordered approximately 84 lots of bacon off sale for short weight; Jones ordered nearly 400 packages of Rath bacon off sale in the period September 29 to December 30, 1971, for the same reason.

On February 17, 1972, the Riverside County Counsel brought an action in the name of the People against Rath in the Superior Court for Riverside County for an injunction under Cal. Civ. Code §3369<sup>6</sup> and for civil penalties under Cal. Bus. and Prof. Code §17536,<sup>7</sup> alleging that Rath had committed acts of unfair competition in violation of Cal. Bus. and Prof. Code §17500<sup>8</sup> by distributing for sale in Riverside County supermarkets the packages of bacon that Jones' representatives had ordered off sale. On March 1, 1972, the Los Angeles County Counsel filed a similar action against Rath in the Superior Court for Los Angeles County.

Rath removed both actions to federal district court within a week thereafter; but on March 20, 1972, the district court remanded the actions to the State courts, finding, at least with respect to the Riverside action, that there was no diversity of citizenship and that "[n]o substantial federal question is presented on the face of the pleadings."

<sup>6</sup>Civil Code §3369 provides in material part:

2. Any person performing or proposing to perform an act of unfair competition within this State may be enjoined in any court of competent jurisdiction.

3. As used in this section, unfair competition shall mean and include • • • any act denounced by Business and Professions Code Section 17500 to 17536, inclusive.

<sup>7</sup>Section 17536:

(a) Any person who violates [§17500] shall be liable for a civil penalty not to exceed two thousand five hundred dollars (\$2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General or by any district attorney, county counsel, or city attorney in any court of competent jurisdiction.

<sup>8</sup>Section 17500:

It is unlawful for any • • • corporation • • • to make or disseminate or cause to be made or disseminated before the public in this State, any representation • • • in any • • • manner or means whatever, concerning • • • personal property • • • or concerning any circumstances or matter of fact connected with the • • • disposition thereof, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading • • •.

Meanwhile, on March 17, 1972, Rath filed two actions in federal district court, one against the People<sup>9</sup> and Becker, the other against Jones. Rath requested declarations that the California statutes and regulations impose labeling standards on meat food products prepared by Rath that are in addition to or different than the standards of the Wholesome Meat Act of 1967, specifically 21 USC, §601(n)(5) and 9 CFR 317.2(h)(2) and that California could not impose weight labeling requirements on Rath meat food products after they left the Rath plant. Rath also requested injunctions against the enforcement by Becker and Jones of labeling requirements in addition to or different than those in the Act and against the ordering off-sale or otherwise preventing the sale of Rath products for failure of the products to bear an accurate label in terms of net weight after they have left Rath's plant. Becker, Jones, and Christensen counterclaimed for the same relief sought by the State in the state court actions.

After the remands, on March 30, 1972, Rath answered the state court complaints and filed cross-complaints seeking the same relief, in virtually the same language, as Rath sought in federal court. In July 1972 Christensen intervened in both the state and federal court litigations.

Becker filed in the district court motions requesting the court either to abstain from deciding the federal court action or to stay the federal action pending final determinations in the state court actions. The district court denied these motions in May 1972. On November 14, 1972, the superior court in the Riverside action dismissed Rath's cross-complaint; Rath appealed. On the very next day, Christensen and Becker moved the district court to dismiss Rath's action or to stay it pending decision on Rath's state appeal. The district court denied the motions, and this court, on Christensen and Becker's petition for a writ of prohibition, declined to disturb the district court's assumption of jurisdiction.

On April 3, 1973, the district court, after a trial on the merits of Rath's action against Becker and on cross-motion for summary judgment in the action against Jones, entered judgment declaring

<sup>9</sup>The People were dismissed as a party by the district court on the ground that the Eleventh Amendment bars suits against the State of California by a citizen of another State. Rath is an Iowa corporation and is a citizen of Iowa for this purpose. No appeal was taken from this dismissal.

Cal. Bus. and Prof. Code §12211 and 4 Cal. Admin. Code ch. 8, subch. 2, Art. 5 to be preempted by federal law and enjoining their enforcement. In the course of its Memorandum the court held that 9 CFR 317.2(h)(2) was invalid, and that thus the sole federal labeling standard was "accurate" weight. The court also held that accurate weight labeling standards could be applied to packages of meat and meat food products at the retail level. Cross-appeals were taken to this court.

The Riverside action continued, and in January 1974, while Rath's first appeal was still pending in the California District Court of Appeal, the superior court entered summary judgment on the complaints of Jones and Christensen against Rath; Rath appealed again. In an unreported decision in April 1974 on Rath's first appeal, the California appellate court reversed the dismissal of Rath's cross-complaint against Jones, holding that the federal court's judgment was *res judicata* on the issue of the validity of §12211 and Art. 5 (to the extent that it implemented §12211). On Rath's second appeal, in December 1974, the appellate court reversed the grant of summary judgment on the complaints and remanded the case to the Riverside superior court for trial, holding that there existed issues of fact that required trial. *People v. Rath Packing Company*, 44 Cal. App. 3d 56, 118 Cal. Rptr. 438 (1974). The appellate court also explained further the basis of its decision on Rath's first appeal, holding that the effect of the federal court judgment was to preclude relitigation of the narrow issue of the preemption of §12211, and its implementation in Art. 5, by the Wholesome Meat Act. The appellate court held, 118 Cal. Rptr. at 446 n. 6, that Art. 5 is not unconstitutional.

Although the record does not contain any notice of the proceedings in the Los Angeles superior court action, we are informed by Rath's reply brief that in February 1974 the Los Angeles court gave *res judicata* effect to the final judgment on the preemption issue and decided in Rath's favor the issues of constitutionality and whether Becker's ordering of Rath's bacon off sale complied with state law. An appeal from this judgment is pending.

# I.

Becker, Jones, and Christensen contend that the district court lacked jurisdiction of the subject matter before it, and, in the alternative, that the principles of abstention and comity required



the court to stay its hand until the state court actions had proceeded to judgment. We reject both contentions.

### A.

The question of subject matter jurisdiction may be raised by the parties at any time or by the court sua sponte. *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1938); F.R.Civ.P. 12(h)(3). Becker et al. first contend that the declaratory judgment actions brought by Rath are nothing more than attempts to get collateral review of the remands to state court of the actions brought against Rath by the People which Rath had removed to the district court. 28 USC, §1447, provides:

§1447. *Procedure after removal generally.*

• • • • •

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise • • •.

Their second contention is that Rath's claim for declaratory and injunctive relief in the district court is in reality a defense to the state court actions, and, as such, cannot form a basis for federal question jurisdiction under 28 USC, §1331.

After the institution of Rath's federal action Becker et al. presented these contentions to this court by way of a petition for a writ of prohibition, *Becker et al. v. Real*, No. 72-3037, which the court, ELY and HUFSTEDLER, Circuit Judges, denied.<sup>10</sup> We find no reason to depart from that decision.

Federal question jurisdiction is determined by the federal district court solely from the face of plaintiff's complaint. *Gully v. First National Bank*, 299 U.S. 109 (1936). Removability cannot be created by defendant pleading a counter-claim presenting a federal question under 28 USC, §1331. See 1 Barron & Holtzoff, *Federal Practice and Procedure* (Wright Ed.) §102; *United Artists Corp. v. Ancore Amusement Corp.*, 91 F. Supp. 132 (S.D.

<sup>10</sup>"It appearing from the face of the pleading that the District Court has jurisdiction, the petition is denied. This Court does not, however, now express any further opinion on the merits of the controversy."

We are not foreclosed by this order from reexamining the jurisdictional issue at this time; we merely find the decision to be sound.

N.Y. 1950). Thus, Rath's answer and cross-complaint in the state court, raising its claim for declaratory and injunctive relief under federal law, were not<sup>11</sup> before the district court when it remanded the removed state court actions and do not raise any issues necessarily adjudicated by the court in deciding to remand. The decision of the district court that the case does not invoke the federal jurisdiction and must be remanded precludes further litigation of the issue of the forum in which the removed case is to be litigated. *Missouri Pacific Ry. Co. v. Fitzgerald*, 160 U.S. 556, 583 (1896). The decision of the district court to remand has no bearing on the merits of the underlying claims. Since the district court did not make any decision with respect to the propriety of a federal forum for Rath's claims, we cannot say that the maintenance of Rath's claim in federal court works a circumvention of 28 USC, §1447(d). Cf. *Chandler v. O'Bryan*, 445 F.2d 1045, 1057 (10th Cir. 1971). Rath is not contending that the remand orders were erroneous, but only that it has a right to a federal forum for its alleged federal claims.

The argument that Rath's claims are not within the federal question jurisdiction, it not being denied that there is no diversity of citizenship, takes its roots in the statement of the Supreme Court in *Public Service Commission v. Wycoff*, 344 U.S. 237, 248 (1952):

Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is a federal-question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense to a threatened cause of action. Federal courts will not seize litigations from state courts merely because one, normally a defendant, goes to federal court to

<sup>11</sup>And could not have been, since the remand order was entered March 20, 1972, and Rath's claims were first presented in the state court actions on March 30, 1972.

begin his federal-law defense before the state court begins the case under state law \* \* \* (emphasis added [by the Court]).

The doubt that the Court expresses is still with us, e.g., C. Wright, *Law of Federal Courts* §18, at 62 (2d Ed. 1970).

In order to appreciate the *Wycoff* case we must first look to the jurisdictional background of the Declaratory Judgment Act, 28 USC, §2201.<sup>12</sup> The Act is procedural only, creating a new federal remedy without expanding the jurisdiction of the federal courts. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937). "Jurisdiction" means the kinds of issues which give right of entrance to federal courts." *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950). The *Wycoff* "test" quoted *supra* has its origins in *Tennessee v. Union & Planters' Bank*, 152 U.S. 454, 464 (1894), where the Court said, "a suggestion of one party, that the other will or may set up a claim under the Constitution or laws of the United States, does not make the suit one arising under that Constitution or those laws." Furthermore, the complaint of the declaratory plaintiff must present a federal question "unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose." *Taylor v. Anderson*, 234 U.S. 74, 75-76 (1914).

In *Wycoff* the complainant brought an action for declaratory judgment against the Utah Public Service Commission, requesting a finding that the business conducted by complainant in carrying goods between points in Utah was interstate commerce (and thus not subject to regulation by the Commission). The principal concern of the Court was the nature of the controversy presented, 344 U.S. at 244;

A multitude of rights and immunities may be predicated upon the premise that a business consists of interstate commerce. What are the specific ones in controversy? The record is silent and the counsel little more articulate. We may surmise that the purpose to be served by a declaratory judgment

<sup>12</sup>§2201 provides:

In a case of actual controversy *within its jurisdiction*, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. \* \* \*. (Emphasis added.)

is ultimately the same as respondent's explanation of the purposes of the injunction it originally asked, which is "to guard against the possibility that said Commission would attempt to prevent respondent from operating under its certificate from the Interstate Commerce Commission." (Emphasis supplied [by the Court].)

From this the Court concluded that "this dispute has not matured to the point where we can see what, if any, concrete controversy will develop." 344 U.S. at 245. In the portion of *Wycoff* quoted three paragraphs above, the Court was applying its concern that the controversy was not ripe for adjudication by pointing out a declaratory plaintiff may not create a controversy by seeking to have a federal court adjudicate federal defenses he might assert in a proceeding before a state court or administrative tribunal which is not ripe, but which is merely threatened or impending.<sup>13</sup>

Another aspect of the matter was aired in *Chandler v. O'Bryan*, *supra*. O'Bryan brought a libel action in Oklahoma state court against Chandler, a United States District Judge, on statements made by Chandler to a newspaper accusing O'Bryan of bribing judges of the Oklahoma Supreme Court. Chandler removed the action to federal district court; but the district court held that the acts alleged in the complaint were not done in performance of Chandler's official duties as a federal judge, nor were they done under color of judicial office, and remanded the case to the state court for lack of a federal question, there being no diversity of citizenship. It is settled that Chandler's judicial immunity defense arises under federal law. *Howard v. Lyons*, 360 U.S. 593 (1959). A verdict for O'Bryan was returned in the state court. Chandler then filed a declaratory judgment action in federal court seeking to have the state libel judgment enjoined and expunged, alleging his federal judicial immunity claim. The district court granted relief to Chandler, 311 F. Supp. 1121 (W.D. Okla. 1969), but the

<sup>13</sup>The Court confirmed this view of *Wycoff* in *Public Utilities Commission of California v. United States*, 355 U.S. 534, 538-39 (1958):

The Commission has plainly indicated an intent to enforce the Act; and prohibition of the statute is so broad as to deny the United States the right to ship at reduced rates unless the Commission first gives approval. The controversy is present and concrete—whether the United States has the right to obtain transportation service at such rates as it may negotiate or whether it can do so only with state approval.



10th Circuit (by a panel of three judges of the 8th Circuit) reversed.

The court found *Wycoff* directly applicable, and held that Chandler was seeking a separate federal adjudication of a matter which was "in reality in the nature of a defense" to the state court libel action, which was based solely on state libel law and raised no federal question itself. The action was dismissed for lack of federal jurisdiction.

The instant case is different. While it is true that judgment in Rath's favor affects the results of the Los Angeles and Riverside actions, we cannot say that Rath's action is premature or that Rath's claim is merely a defense to the state court actions. The ordering off-sale of Rath's products in September 1971 and afterward and the upward adjustment of the pass range at the sealing station at Rath's plant, increasing the overpack of bacon necessitated by California weighing procedures, it was stipulated below, caused Rath a loss of more than \$10,000. The off-sale orders themselves are sufficient State action to create an actual controversy between Rath and the state weights and measures officials. See *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 508 (1972). The present controversy was not created by the institution of the state court actions against Rath, but arose independently thereof by virtue of the off-sale orders.

Unlike *Chandler*, Rath's claims have vitality in the absence of the litigation in state court; Rath had the right to a federal forum before the institution of the state court actions. Chandler's federal claim was purely in the nature of a defense to the libel action. Brought without reference to the underlying state court proceeding, Chandler's claim would be a useless gesture: no one would care whether Chandler acted under the protection accorded by the courts to his office if O'Bryan had refrained from suing him. That Rath's claim is or can be the basis for a defense to the state court actions states a mere truism;<sup>14</sup> the test is whether Rath

<sup>14</sup>Becker, Jones, and Christensen do not assert that Rath's cross-complaints in the state court actions were compulsory under Cal. Code of Civ. Proc. §428.10; they assert that they were *improper* pleadings under the statute. We have no opinion on this matter of state procedure, but it does seem to us to show that the interposition of affirmative claims by Rath in the state courts is not a relevant factor in determining whether the federal courts have jurisdiction of Rath's affirmative claims.

has created a federal controversy where none existed or is seeking an adjudication of a claim which is essentially meaningful only when pleaded as a defense to the particular pending state court actions. We find neither factor present and consider that Rath has stated claims which are within the federal jurisdiction conferred on the district court by 28 USC, §1331.<sup>15</sup>

### B.

We also hold that considerations of comity and abstention did not require the district court to relinquish jurisdiction.

Comity is a principle of long standing:

We live in the jurisdiction of two sovereignties, each having its own system of courts to declare and enforce its laws in common territory. It would be impossible for such courts to fulfil their respective functions without embarrassing conflict unless rules were adopted by them to avoid it. The people for whose benefit these two systems are maintained are deeply interested that each system shall be effective and unhindered in its vindication of its laws. The situation requires, therefore, not only definite rules fixing the powers of the courts in cases of jurisdiction over the same persons and things in actual litigation, but also a spirit of reciprocal comity and mutual assistance to promote due and orderly procedure.

• • • • •

The chief rule which preserves our two systems of courts from actual conflict of jurisdiction is that the court which first takes the subject-matter of the litigation into its control,

<sup>15</sup>Jones' argument that the district court improperly assumed jurisdiction of a *res* already in the control of the state courts is without merit. Suits for injunctions are *in personam*, not *in rem*, *Penn General Casualty Co. v. Pennsylvania*, 294 U.S. 189, 195 (1935), and state and federal courts having concurrent jurisdiction are "free to proceed in [their] own way . . .", without reference to the proceedings in the other court. . . . The rule, therefore, has become generally established that where the action first brought is *in personam* and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded." *Kline v. Burke Construction Co.*, 260 U.S. 226, 230 (1922). We observe that in any case Rath's claims were made in district court thirteen days before Rath's state cross-complaints were filed. The controversy here is not over any property right or status in the *bacon*, but over the enforcement of state laws which affect how the *bacon* is sold.

whether this be person or property, must be permitted to exhaust its remedy to attain which it assumed control, before the other court shall attempt to take it for its purpose. *Ponzi v. Fessenden*, 258 U.S. 254, 259-60 (1921).

This circuit has defined the rule of comity as "merely recognizing exclusive jurisdiction in the court first acquiring jurisdiction of any action." *Gregg v. Winchester*, 173 F.2d 512, 513 (9th Cir. 1949). Under these rules and in the present circumstances, the principle of comity does not suggest that the district court should have declined to hear Rath's claims. The subject matter of the litigation before us consists of the *federal questions* raised by Rath in its complaint. These federal questions were first taken into the control of a court when Rath filed its complaint in the district court on March 17, 1972. No state court could have acquired jurisdiction over this subject matter until Rath answered and filed its cross-complaints in the state courts on March 30, 1972. Our conclusion is reinforced by the actions of the District Court of Appeal in the Riverside action twice giving *res judicata* effect to the federal district court judgment. If, as Becker and Christensen contend, the only matter preventing the first Riverside judgment, dismissing Rath's cross-complaint against Jones, from being given preclusive effect as a final judgment is Cal. Code of Civ. Proc. §1049,<sup>16</sup> the California appellate court would not have directed the trial court to abandon its position and to follow the federal judgment, which, since it had been appealed, was just as "final" as the Riverside judgment if evaluated under California law. We do not see here the federal-state conflict that the comity doctrine seeks to avoid. The district court acquired jurisdiction over the federal question prior to the state courts, and very scrupulously avoided deciding even tangentially the constitutionality of the California statutes and regulations or whether the actions of the inspectors were in compliance with state law. The state courts have not questioned the right of the district court to take the action it did and held the federal judgment entitled to preclusive effect in the state courts on the particular issues litigated in the federal court.

<sup>16</sup>Cal. Code of Civil Procedure §1049:

An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, \* \* \*.

In applying the abstention doctrine a federal district court has discretion in declining to exercise or postponing the exercise of jurisdiction it already has in deference to a state court resolution of underlying issues of state law. *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941). Abstention is appropriate only where the issue of state law is uncertain, *Harman v. Forssenius*, 380 U.S. 528 (1965), and where "the delay and expense to which the application of the abstention doctrine inevitably gives rise" can be justified. *England v. Board of Medical Examiners*, 375 U.S. 411, 418 (1964). However, abstention is not automatic whenever a question of state law may be involved. As the Court said in *Baggett v. Bullitt*, 377 U.S. 360, 376-77 (1964), a case in which the Court considered abstention to be unnecessary:

In the bulk of abstention cases in this Court, \* \* \* the unsettled question of state law principally concerned the applicability of the challenged statute to a certain person or a defined course of conduct, whose resolution in a particular manner would eliminate the constitutional issue and terminate the litigation.

This statement reflects the judicial policy of avoiding the adjudication of federal constitutional questions unless they are ripe and are squarely presented by the record.

"The basic question involved in [federal preemption] cases, however, is never one of interpretation of the Federal Constitution but inevitably one of comparing two statutes." *Swift & Co. v. Wickham*, 382 U.S. 111, 120 (1965). Thus we do not have a situation where a state law interpretation by a state court may eliminate a federal constitutional question. Cf. *Reetz v. Bozanich*, 397 U.S. 82 (1970). There is no contention by Becker, Jones, or Christensen that California law is unclear or ambiguous or that the construction of California law in the state courts will obviate a decision on Rath's federal preemption claim. The California statutes and regulations apply to Rath without question. We think this case is akin to *Harman v. Forssenius*, supra, in which the Court said: "If the state statute in question, although never interpreted by a state tribunal, is not fairly subject to an interpretation which will render unnecessary or substantially modify the federal \* \* \* question, it is the duty of the federal court to exercise its properly invoked jurisdiction. *Baggett v. Bullitt*, 377 U.S.



360, 375-379." We hold that the district court did not abuse its discretion in refusing to abstain.

## II.

In holding 9 CFR 317.2(h)(2) invalid, the district court said:

[The section] is void for its inadequacy to set any recognizable standard upon which any individual may measure his conduct or his compliance with the law by which he must order his personal or business life. 357 F. Supp. at 534.

Rath alleges two bases of error: (1) the validity of the regulation was not put in issue by the parties below and should not have been considered by the district court; and (2) the district court erred on the merits of the issue.

Rule 16 of the Federal Rules of Civil Procedure provides that "[t]he court shall make an order . . . which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action unless modified at the trial to prevent manifest injustice." [Emphasis added.] The pretrial order entered by the court with the consent of the parties in the Becker action does not name as an issue the validity of 9 CFR 317.2(h)(2); nor, for that matter, do the pleadings and motion papers in the Jones action. The first appearance of the issue in the Jones action was at the argument on the motions for summary judgment:

THE COURT: The question is, is the regulation, and that is (h)(1) and (2) and particularly (2), that is 317.2(h)(2), is it a valid regulation.

MR. KEIR [Counsel for Jones]: Well, we don't challenge the validity of (h)(2).

THE COURT: You don't? You don't? I have some serious questions about it.

MR. KEIR: Maybe I should retract that for the record. Frankly, I hadn't considered whether it is valid or not. I merely submit to the court, and this is the position we have taken right along, is that (h)(2) is an innocuous provision.

It was not until the close of the trial of the Becker action that the district judge requested argument on the issue, and by so doing put the issue before the parties.

Ordinarily, issues not squarely presented in the pleadings and motion papers or not preserved in the pretrial order are considered to have been eliminated from an action. See, e.g., *L & E Co. v. United States ex rel. Kaiser Gypsum Co.*, 351 F.2d 880 (9th Cir. 1965); *Fowler v. Crown Zellerbach Corp.*, 163 F.2d 773 (9th Cir. 1947; see also 3 *Moore's Federal Practice* ¶16.19. This is particularly true in a declaratory judgment action, where the court is called upon to adjudicate only those matters as to which the parties ask that their rights be determined. In this case, however, the parties have fully briefed and argued this issue both here and before the district court. In their consolidated post-trial memorandum, Becker and Christensen requested a declaration that 9 CFR 317.2(h)(2) was invalid. Rath does not claim that the court's consideration of the issue—as opposed to its decision on the issue, with which Rath differs—has resulted in any actual prejudice to it, nor did Rath object in its reply brief in the district court to consideration of the issue. By failing to object, Rath may be deemed to have acquiesced in an expansion of the issues by the court from those set forth in the pretrial order. Furthermore, the issue, as discussed below, is one of "facial" invalidity under the 5th Amendment which does not require a fully developed evidentiary basis for its resolution. Cf. *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947). We note the public importance of this question, and the possibility of review of our judgment herein. Since a controversy presently exists between the parties on the issue, and since the judgment of the district court turned in large part on its resolution of this issue, we proceed to the merits of the controversy.

Although we have some doubts as to the applicability of the "void-for-vagueness" doctrine in its traditional formulation<sup>17</sup> to

<sup>17</sup>*Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926):

That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. [Emphasis added.]

See also *United States v. Harriss*, 347 U.S. 612, 617 (1954).

this non-criminal situation, the parties do not question the doctrine's applicability to this case. However, we need not decide its applicability, since we are of the opinion that the regulation passes muster when the due process standards enunciated by the criminal cases in the economic area are applied to it. There is no claim that 1st Amendment rights are involved, the presence of which would necessitate stricter scrutiny by us. *Smith v. Goguen*, 415 U.S. 566, 572-73 (1974).

The crux of the district court's holding of invalidity can be found in the following [357 F. Supp. at 534]:

What [*United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77 (1932)], *supra*, is telling us is that the statutory delegation is viable. It does not give viability to a redelegation that is subject to varying degrees of reasonableness. The statute gives the Secretary the power of definition of "reasonable variations." The Secretary here has completely failed to accept the duty that can be expressed only in rules and regulations properly promulgated pursuant to federal laws. [Footnote omitted; emphasis in original.]

Neither the statute nor the regulations contain quantitative statements of what variations will be considered reasonable.<sup>18</sup> There is likewise no evidence tending to show how much weight variation is considered reasonable by the trade. In the absence of evidence of how the regulation is applied, the burden rests on the parties challenging the regulation, Becker and Christensen, to show that the regulation is incapable of setting a standard of enforcement on its face.<sup>19</sup> Their challenge fails for two independent reasons, which correspond to the separate rationales underlying the portions of the district court's opinion reproduced *supra*.

<sup>18</sup>Rath offered as evidence a USDA manual purporting to contain the quantitative variations to be permitted by USDA inspectors, which the court excluded as irrelevant and as not having been promulgated by the Secretary of Agriculture under the Wholesome Meat Act by publication in the Federal Register. Rath does not urge this ruling as error, and we shall not comment on it. Except for this manual, however, Rath concedes that the quantitative scope of "reasonable variations" recognized by the Secretary is nowhere set forth in any writing.

<sup>19</sup>*United States v. National Dairy Products Corp.*, 372 U.S. 29, 32-33 (1963).

The district court seems concerned with "reasonableness" as a standard for guiding conduct. This standard is of ancient provenance in English and American law and is not obnoxious in itself to the Fifth Amendment of the Constitution. In the ordinary negligence case, for instance, the sole difference between no liability and a sizeable penalty in the form of damages may be whether the acts in issue are considered those of a *reasonable* man by a jury long after the fact. A more telling analogy is found in the criminal application of the Sherman Act, 15 USC, §1 et seq. The English courts distinguished legal from illegal contracts restraining trade by whether the restraint imposed was reasonable. *Mitchel v. Reynolds*, 1 P. Williams 181, 24 Eng. Rep. 347 (King's Bench, 1711); see discussion in *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271 (6th Cir. 1898), *mod. and aff'd.*, 175 U.S. 211 (1899); and *Standard Oil Co. v. United States*, 221 U.S. 1, 51 (1911). *Standard Oil*, *supra*, construed the prohibition of the Sherman Act against "[Any] contract, combination . . . , or conspiracy, in restraint of trade . . . ," to apply only to those restraints which are unreasonable as understood in the common law. When the criminal application of the Sherman Act was challenged, in *Nash v. United States*, 229 U.S. 373 (1912), on the ground that "the crime defined by the statute contains in its definition an element of degree as to which estimates may differ," Mr. Justice Holmes, speaking for the Court, said:

But apart from the common law as to restraint of trade thus taken up by the statute the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death. . . . We are of opinion that there is no constitutional difficulty in the way of enforcing the criminal part of the act. 229 U.S. at 378-79.

See also *United States v. Ragen*, 314 U.S. 513, 523-24 (1942). More recently, the Supreme Court upheld against a constitutional challenge a criminal proceeding under §3 of the Robinson-Patman Act, 15 USC, §13a, which makes it a crime to sell goods at "unreasonably low prices for the purpose of destroying competition or eliminating a competitor." *United States v. National Dairy Corp.*,



372 U.S. 29, 34-36 (1963).<sup>20</sup> We conclude, therefore, that the regulation, which permits "reasonable variations caused by loss or gain of moisture during the course of good distribution practices or by unavoidable deviations in good manufacturing practices," has not been shown by the parties claiming its invalidity to be impossible of application without depriving those to whom it is applied fair notice of the practices which are not within the permission of the regulation. The nature of the recognized variations is clearly set forth; Becker, Jones, and Christensen have not alleged that those subject to the regulation, such as Rath,<sup>21</sup> could not perceive the conditions under which the regulation would permit reasonable variations in weight to be recognized. The characterization of the recognized variations as "reasonable" is not constitutionally infirm in itself, as the cases show. Our conclusion is confirmed by the holding of the Supreme Court in *Parker v. Levy*, 417 U.S. 733 (1974), that Article 134 of the Uniform Code of Military Justice, which punishes "[a]ll disorders and neglect to the prejudice of good order and discipline in the armed forces," is not void for vagueness. See also *Ricci v. United States*, 507 F.2d 1390 (Ct. Cl. 1974). Application of the regulation, as gauged on this record, does not offend the due process clause of the 5th Amendment, as it has not been shown that the regulation fails to give fair notice of the variations to be permitted under it.

The second prong of the district court's criticism of the regulation is that it constitutes an impermissible redelegation to USDA field inspectors of the authority granted by Congress to the Secretary to determine what variations caused by gain or loss of moisture, etc., were to be permitted. This conclusion is error, as the legislative history and precedent demonstrate.

<sup>20</sup>The Court did not uphold the statute on its face, but only as applied to the acts charged in the indictment. The Court did, however, distinguish the case from *United States v. Cohen Grocery Co.*, 255 U.S. 81 (1921), in which a statute proscribing "any unjust or unreasonable rate or charge" was invalidated. The Court saved §3 by finding that the statute made clear reference to the nature of the conduct prohibited, i.e., that which was intended to destroy competition, etc. 372 U.S. at 35.

<sup>21</sup>9 CFR 302.1(a) provides:

(a) Inspection under the regulations in this subchapter [which includes 317.2(h)(2)] is required at:

(1) Every establishment . . . in which any products of . . . carcasses of livestock . . . are prepared for transportation or sale as articles of commerce, which are intended for use as human food.

In enacting the Wholesome Meat Act of 1967, Congress made additions to the statutory framework underlying federal meat inspection programs and standards. In particular, Congress created a series of definitions modeled on the definitions used in the Food, Drug, and Cosmetic Act, 21 USC, §301 et seq. In S. Rep. No. 799, 90th Cong., 1st Sess.,<sup>22</sup> the Committee said with respect to Sec. 1(n) of S. 2147, which became 21 USC, §601(n), the statutory basis of the questioned regulation:

(n) *Misbranded*.—The definition of this term not heretofore used in the Meat Inspection Act, is discussed in connection with section 12. It is based on the definition of the same term in the Federal Food, Drug, and Cosmetic Act and is identical except that—

In new section 1(n)(5) the introductory phrase is slightly different in that it refers to "other container" besides packages and requires a label "showing" rather than "containing" specified information; and in the proviso, reasonable variations and exemptions "may" instead of "shall" be allowed by the Secretary of Agriculture instead of the Secretary of Health, Education, and Welfare. Also an internal reference to a clause is made in different terms than in the Federal Food, Drug, and Cosmetic Act.

• • • •

It is therefore proper for us to consider the history and construction of the Food, Drug, and Cosmetic Act prior to 1967 in interpreting the scope of the Secretary's power to promulgate regulations.

In *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77 (1932), the Supreme Court had occasion to construe the Food and Drug Act and regulations thereunder, as they were in force at that time. The relevant portion of the Act provided:

[A]n article of food shall be deemed misbranded—

• • • •

Third. If in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count: *Provided, however,* That reasonable variations shall be per-

<sup>22</sup>2 U. S. Code, Cong. and Admin. News, 90th Cong., 1st Sess., p. 2188-2213 (1967).

mitted and tolerances and also exemptions as to small packages shall be established, by rules and regulations made in accordance with \* \* \* this Act.

The regulation stated:

(i) The following tolerances and variations from the quantity of the contents marked on the package shall be allowed:

(1) Discrepancies due exclusively to errors in weighing, measuring, or counting which occur in packing in compliance with good commercial practice.

\* \* \*

(3) Discrepancies in weight or measure, due exclusively to differences in atmospheric conditions in various places, and which unavoidably result from the ordinary and customary exposure of the packages to evaporation or to the absorption of water.

Discrepancies under classes (1) and (2) of this paragraph shall be as often above as below the marked quantity. The reasonableness of discrepancies under class (3) of this paragraph will be determined on the facts in each case.

The resemblance between the present statute and regulation and the statute and regulation in force in 1932 is apparent.

The Court held that the substantive standard created by the Act was that packages be marked plainly and conspicuously with their weights, and that the statutory proviso gave the involved Secretaries the administrative authority to permit reasonable variations from this hard and fast rule. The Court continued [287 U.S. at 84]:

Moreover, the practical and long continued construction of the executive departments charged with the administration of the act and with the duty of making the rules and regulations therein provided for, has been in accordance with the view we have expressed as to the meaning of the section under consideration. The rules and regulations, as amended on May 11, 1914, deal with the entire subject in detail under the recital, "(i) The following tolerances and variations [italics supplied] from the quantity of the contents marked on the package shall be allowed: . . ." Then follows an enumeration

of discrepancies due to errors in weighing which occur in packing conducted in compliance with good commercial practice; due to differences in capacity of bottles and similar containers, resulting from unavoidable difficulties in manufacture, etc.; or in weight due to atmospheric differences in various places, etc. These regulations, which cover variations as well as tolerances and exemptions, have been in force for a period of more than eighteen years, with the silent acquiescence of Congress.

The Court did not question the authority of the Secretary to promulgate the regulation. In the forty-two years since the *Shreveport Grain* case Congress has not changed its delegation of authority to the Secretary to "permit reasonable variations," nor have the regulations promulgated expressly under that authority included any quantitative expressions of the variations to be permitted.

The question, therefore, is: Has the Secretary failed to heed the intent of Congress in giving him authority to permit reasonable variations by declining to put numerical limits on the variations he and his representatives will permit in the enforcement of the substantive standard of the Act? In the Food, Drug, and Cosmetic Act of 1938, 52 Stat. 1040, Congress reenacted the provisions of the prior Act in substantially identical terms to those before the Court in *Shreveport Grain*.<sup>23</sup> It has been held that Congress gives a regulation the force and effect of law by reenactment of the statutory provision to which it pertains. *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U.S. 110 (1939). We note also the presumption that reenactment of a statutory provision by Congress without significant change indicates its approval of prior judicial interpretation of that provision. *United States v. Douglas Aircraft Co.*, 510 F.2d 1387 (CCPA 1975). Becker, Jones, and Christensen have adduced nothing to overcome the conclusion that the regulation is a valid exercise of the authority delegated to the Secretary

<sup>23</sup>Sec. 403. A food shall be deemed misbranded—

\* \* \*

(e) If in package form unless it bears a label containing \* \* \*  
(2) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count: *Provided*, That under clause (2) of this paragraph reasonable variations shall be permitted and exemptions as to small packages shall be established by regulations prescribed by the Secretary.



by Congress. The regulation must be presumed valid, and the burden is on those contending its invalidity to persuade us otherwise. Forty-two years of Congressional silence is strong evidence that Congress has acquiesced in the Secretary's interpretation of the scope of his powers. See *Flood v. Kuhn*, 407 U.S. 258, 282 (1972); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969). We do not, for the above reasons, concur in the district court's analysis of *Shreveport Grain*, and hold that the district court erred in finding 9 CFR 317.2(h)(2) invalid.

### III.

The central issue in this litigation is whether sections of the California statute and regulations promulgated thereunder are preempted by the Wholesome Meat Act of 1967 and 9 CFR 317.2(h)(2). The district court based its holding of preemption on its finding that the statistical variations allowed by California from the accurate weight standard imposed by 21 USC, §601(n)(5), in the absence of valid regulations permitting reasonable variations thereunder, created a net weight labeling standard "different than" the federal standard. We agree with the holding, but not with the reasoning on which it was based.

"Our principal function is to determine whether, under the circumstances of this case [the state regulations and] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the Wholesome Meat Act and delegating to the Secretary the power to make regulations thereunder. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The inquiry in this case will follow the lines set forth in *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963):

The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained.

21 USC, §678, was enacted as part of the Wholesome Meat Act of 1967, Pub. L. 90-201, §408, 81 Stat. 600. We are of the opinion that in it "Congress has unmistakably so ordained." Accord, *Armour and Company v. Ball*, 468 F.2d 76 (6th Cir. 1972). This

conclusion follows from the clear language and legislative history of 21 USC, §678. The first part of the section reads in relevant part:

Requirements within the scope of this chapter with respect to premises, facilities and operations of any establishment at which inspection is provided under subchapter I of this chapter, which are *in addition to, or different than those made under this chapter may not be imposed by any State* \* \* \*, except that any such jurisdiction may impose record-keeping and other requirements within the scope of section 642 of this title, if consistent therewith, with respect to any such establishment. Marking, labeling, packaging, or ingredient requirements *in addition to, or different than*, those made under this chapter may not be imposed by any State \* \* \* with respect to articles prepared at any establishment under inspection in accordance with the requirements under subchapter I of this chapter \* \* \*. [Emphasis added.]

The report of the Senate Committee, S. Rep. No. 799, 90th Cong., 1st Sess., states:<sup>24</sup>

The committee feels that Federal standards must be required of all meat and meat food products sold for human consumption in this country.

\* \* \*

However, the committee wants it clearly understood that the requirements on wholesomeness, additives, labeling, and the other Federal regulations are not to be compromised and must be at least equal to Federal standards.

\* \* \*

Section 408 [codified at 21 USC, §678] would exclude States \* \* \* from imposing marking, labeling, packaging, or ingredient requirements in addition to or different than those under the Federal Meat Inspection Act for articles prepared in accordance with title I of the act \* \* \*.

This language clearly shows the intent of Congress to create a uniform national labeling standard, under the definitions set forth in the Wholesome Meat Act, including the definition of "mis-

<sup>24</sup>2 U.S. Code Cong. and Admin. News, 90th Cong., 1st Sess., 2191, 2207 (1967).

branding" in §601(n). The express language of §678 implements this clear Congressional intent.

In the absence of regulations under the Act the statutory labeling<sup>25</sup> standard under the Act is that the label reflect "accurate" weight, as the district court held. 9 CFR 317.2(h)(2) adds to this federal standard the condition that "reasonable variations caused by loss or gain of moisture during the course of good distribution practices . . . will be recognized." The California statutes and regulations must impose such a standard of labeling on Rath or they are preempted by federal law as requiring weight information on labels "different than" that required by federal law.

Cal. Bus. and Prof. Code §12211 establishes the following standard: "that the *average* weight or measure of the packages or containers in a lot of any such commodity sampled shall not be *less*, at the time of sale or offer for sale, than the net weight or measure stated upon the package." (Emphasis added.) This section also provides for the promulgation of regulations to govern the sampling and weighing procedures. The California regulations, the district court concluded, provide only for a statistical variation from the absolute accurate weight and make no reference to loss of moisture from the packages of bacon (or other products that lose moisture, for that matter) experienced between the time the bacon is weighed in the plant and the time that California inspectors weigh the bacon at the retail store. We agree with the district court that Cal. Bus. and Prof. Code §12211 and 4 Cal. Admin. Code, ch. 8, subch. 2, Art. 5, impose labeling standards "different than" those under federal law and may not be enforced.

Jones, Becker, and Christensen claim that this holding infringes on the legitimate interests of the State of California protecting its citizens from short-weight meat products. We cannot agree. Christensen and Becker recognized the true situation in their brief: "Christensen and Becker submit that by [21 USC, §678] Congress sanctioned the adoption by the states of laws (statutes and regu-

<sup>25</sup>Jones' argument that California imposed no "labeling" requirements, but rather sought to prevent "misbranding" under Cal. Bus. and Prof. Code §12211, is strained. 21 USC §601(n) read as a whole, defines violation of its "labeling" requirements as "misbranding." As we hold below, the federal standards, which include definitions of terms, prevail over conflicting State standards.

lations) which impose the same *standard* required by the Wholesome Meat Act . . . and which are enforced by means of state enforcement procedures. (Emphasis in original.) The concluding portion of §678 reads in relevant part as follows:

. . . but any State . . . may, consistent with the requirements under this chapter, exercise concurrent jurisdiction with the Secretary over articles required to be inspected under said subchapter I, for the purpose of preventing the distribution for human food purposes of any such articles which are adulterated or misbranded and are outside of such an establishment . . . This chapter shall not preclude any State or Territory or the District of Columbia from making requirement or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter.

Our holding does not diminish the Congressional grant in §678 to the States of enforcement jurisdiction concurrent with the Secretary over misbranded articles outside federally inspected establishments, *if the States do not impose labeling and other requirements "in addition to or different than" the federal standards when exercising their concurrent jurisdiction.* We have merely held that California cannot exercise its concurrent jurisdiction through the particular standards established by §12211 and Art. 5. California is free to enact other statutes and regulations which do not offend §678. It must be further understood that the only matters at issue are net weight labeling standards; our judgment herein does not pertain to other matters which are or may be regulated by the State of California.

#### IV.

Rath urges as error the holding of the district court that the federal net weight standard set by 21 USC, §601(n)(5), "can be applied to packages of meat or meat food products at the ultimate end of a meat processor's distribution system—the retail store." Implicit in this holding is that California may exercise the concurrent enforcement jurisdiction permitted it by 21 USC, §678, by the imposition of appropriate standards through the inspection of packages at the supermarket.

Rath's position is at odds with the intent of the Wholesome Meat Act and with the grant of concurrent enforcement jurisdic-



tion to the States. 21 USC, §602, states that "It is essential in the public interest that the health and welfare of consumers be protected by assuring that meat and meat food products *distributed to them* are wholesome, not adulterated, and properly marked, labeled, and packaged." (Emphasis added.) 21 USC, §624, gives the Secretary the power to promulgate regulations governing the storage and handling of meat and meat food products "to assure that such articles will not be \* \* \* misbranded *when delivered to the consumer*." (Emphasis added.) The emphasized portions make it clear to us that Congress intended to continue the protection provided under the Wholesome Meat Act to the point at which the consumer receives the meat and meat food products subject to the Act, i.e., at the retail food store level.<sup>26</sup>

21 USC, §673(a) provides for federal seizure of misbranded meat and meat food products which are "held for sale [i.e., in a retail store] in the United States after \* \* \* transportation [in commerce]," and §673(b) indicates that federal seizure does not "derogate from authority for condemnation or seizure conferred by \* \* \* other laws." The concurrent jurisdiction granted by 21 USC, §678, to enforce appropriate State standards outside of federally inspected establishments would be a nullity if it were to be construed to prevent State enforcement at a level of distribution which Congress clearly intended to be subject to *non-exclusive* federal regulation.

Rath, however, argues that the federal net weight standard requires that the label be accurate only when the product leaves the establishment, relying on 21 USC, §607(b).<sup>27</sup> Accordingly, says Rath, the State may not require conformance with the federal standard of accurate weight, with reasonable variations, etc., considered, past that point. Such an argument renders meaningless the allowance of reasonable variations for gain or loss of moisture *during the course of good distribution practices*. Why

<sup>26</sup>See also, 9 CFR 317.2(b), promulgated under 21 USC, §601(n)(6), which provides in part:

[Any label term must be] likely to be read and understood by the ordinary individual under customary conditions of purchase and use.

<sup>27</sup>"(b) All \* \* \* meat and meat food products inspected at any establishment under the authority of this subchapter \* \* \* shall at the time they leave the establishment bear \* \* \* the information required under paragraph (n) of section 601 of this title." (Emphasis added.)

would the federal scheme consider distribution practices to be relevant at all if the federal net weight labeling standard applied only at the point at which distribution of the product commenced? We cannot attribute such a restrictive reading to §607(b). Rath's objections are met by the reasonable variations allowance; whatever weight variation results from gain or loss of moisture occurring in the chain of distribution from packing plant to retail store *must*, under 9 CFR 317.2(h)(2), be taken into account in determining whether the net weight labeling of a package at retail complies with the federal standard.

## V.

After the district court filed its order enjoining the enforcement of Cal. Bus. and Prof. Code §12211 and 4 Cal. Admin. Code ch. 8, subch. 2, Art. 5, Christensen promulgated a new regulation, Art. 5.1, to

\* \* \* apply only during the proceedings [of the instant case].

This Article is adopted as a temporary authority to protect California wholesalers, retailers, and consumers against short weight packages of meat and meat products \* \* \*.

The district court refused to modify its order to enjoin the enforcement of Art. 5.1 and Cal. Bus. and Prof. Code §12607, the alleged statutory authority for the regulation. Rath requests us to enlarge the declaration and injunction to hold invalid and enjoin the enforcement of these provisions as well.<sup>28</sup>

§12607 provides:

Whenever a consumer commodity is offered for sale, exposed for sale, or sold without a statement of net quantity appearing thereon \* \* \*, the sealer shall in writing order the commodity off sale and require that a correct statement of net

<sup>28</sup>Rath did not appeal separately from the denial of its motion to amend the judgment. The issue was preserved by Rath's initial notice of appeal, since the injunction granted by the district court was narrower in scope than the relief requested by Rath. Rath's notice of appeal specifically noted the limitation of relief. We also note that the district court, 357 F. Supp. at 533, relied on Becker, Jones, and Christensen's citation of §12211 as the primary statutory authority in fashioning the remedy. By changing their statutory basis of authority, they scarcely should argue that Rath has the burden of foreseeing what regulations they will use next.

quantity be placed on the commodity before the same may be released by the sealer.

This section, standing by itself, is innocuous if "net quantity" is a designation of contents by weight which is not "in addition to or different than" the federal net weight labeling requirements. Art. 5.1 shows that the interpretation of "net quantity" enforced in California is "different than" the federal standard:

2940.1. *Package Inspection.* (a) Each sealer of weights and measures shall, within his county, inspect packages of meat and meat products and poultry and poultry products to determine whether the label weight stated on the package is accurate at time of inspection.

(b) The determination of accuracy shall be made by weighing all of the usable product within the container, exclusive of wrappers and packing substances.

(c) As an alternate procedure to the procedure stated in subsection (b), the scaler of weights and measures shall establish an accurate tare weight for the containers within a lot of packages and weigh each of the inspected packages. He shall:

(1) Remove 3 packages from the lot at random and weigh each of the unopened packages;

(2) Remove from each of the 3 containers all of the usable product, exclusive of wrappers and packing substances; and

(3) Determine the tare weight for each of the 3 packages separately by subtracting the weight of the usable product from the gross weight.

He shall weigh separately each of the packages in the lot to be inspected and apply as a tare weight for purposes of the lot the lowest tare weight obtained by the above procedure.

(d) For purposes of the procedure specified in subsection (c), a lot is defined as a group of packages assembled in one place, of the same product and brand, in apparently identical containers, bearing the same statement of weight.

It is clear beyond cavil that Art. 5.1 makes no allowance for variations from accurate weight *whatever*. Since the federal standard, by virtue of 9 CFR 317.2(h)(2), requires recognition of reason-

able variations due to gain or loss of moisture, etc., Art. 5.1 is preempted by the federal standard and may not be enforced. To the extent that §12607 is interpreted to permit a definition of "net quantity" which does not recognize the reasonable variations allowed by the federal standard, it is likewise preempted and may not be enforced.<sup>29</sup> The applicability of Art. 5.1 only during the "proceedings" of this case does not deter us from considering its enforcement improper, since we have no control over the interpretation of its period of applicability either administratively or by a state court except by assuring by injunction that Art. 5.1 will not be enforced at all.

## VI.

### CONCLUSION

In recapitulation we hold:

(1) that the district court had jurisdiction over the subject matter of this case, personal jurisdiction being conceded;

(2) that the district court erred in invalidating 9 CFR 317.2(h)(2);

(3) that the Wholesome Meat Act of 1967, 21 USC, §601 et seq., and 9 CFR 317.2(h)(2) preempt Cal. Bus. and Prof. Code §12211 and 4 Cal. Admin. Code ch. 8, subch. 2, Art. 5, and that Becker, Jones, and Christensen were properly enjoined from enforcing those sections;

(4) that the district court correctly held that state standards not in addition to or different than the federal net weight

<sup>29</sup>Section 12607 is not saved by Cal. Bus. and Prof. Code §12613, which provides:

If any provision of this chapter is less stringent or requires information different from any requirement of Section 4 of the act of Congress entitled[d] "Fair Packaging and Labeling Act" (P.L. 89-755; 80 Stat. 1296, 15 U.S.C. 1451-1461) or of any regulation promulgated pursuant to such act, the provision shall be inoperative to the extent that it is less stringent or requires information different from any such federal requirement, in which event each such federal requirement is a part of this chapter.

No California standard, even if of equal or greater stringency than the federal standard, may be enforced if it is *different* from the federal standard. As enforced in Art. 5.1, §12607 is different from the Wholesome Meat Act standard, whether less stringent or not. The Fair Packaging and Labeling Act is, of course, not relevant to this case.



labeling standard may be enforced by appropriate State procedures at the retail level; and

(5) that 4 Cal. Admin. Code ch. 8, subch. 2, Art. 5.1, is preempted by federal law, that Cal. Bus. and Prof. Code §12607 is preempted by federal law to the extent indicated in part V, supra, and that their enforcement should be enjoined.

Accordingly, the judgment of the district court is affirmed in part, reversed in part, and the case is remanded for entry of an amended order in conformance with this opinion.

## UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GENERAL MILLS, INC., a corporation; THE PILLSBURY COMPANY, a corporation; SEABOARD ALLIED MILLING CORPORATION, a corporation,  
*Plaintiffs-Counterdefendants-Appellants,*

vs.

JOSEPH W. JONES, as Director of the County of Riverside Department of Weights and Measures,  
*Defendant-Counterclaimant-Appellee.*

No. 74-1051

GENERAL MILLS, INC., a corporation; THE PILLSBURY COMPANY, a corporation; SEABOARD ALLIED MILLING CORPORATION, a corporation,  
*Plaintiffs-Counterdefendants-Appellees,*

vs.

JOSEPH W. JONES, as Director of the County of Riverside Department of Weights and Measures,  
*Defendant-Counterclaimant-Appellant.*

No. 73-3583

OPINION

[October 29, 1975]

Appeal from the United States District Court  
for the Central District of California

Before: BROWNING and TRASK, Circuit Judges,  
and RICH,\* Judge, United States Court of Customs and  
Patent Appeals.

RICH, Judge:

This suit was brought by the three plaintiff corporations, General Mills, Pillsbury, and Seaboard Allied Milling, hereinafter termed "the millers," to enjoin the enforcement of certain California statutes and regulations pertaining to the labeling by weight

\*The Honorable Giles S. Rich, Judge, United States Court of Customs and Patent Appeals, sitting by designation.

of packaged foods at retail. Plaintiffs also seek declarations under 28 USC §2201 and §2202 that these statutes and regulations are preempted by federal law and that the means of enforcement employed, off-sale orders under Cal. Business and Professions Code §12211, violated the due process clause of the Fourteenth Amendment, unreasonably burdened interstate commerce, and were imposed in violation of California law. The millers requested a three-judge district court pursuant to 28 USC §2281.<sup>1</sup> Defendant Jones, as Director of the County of Riverside Department of Weights and Measures, is the official responsible for the enforcement of state weights and measures laws in his county. Jurisdiction in the district court was based on 28 USC §1331(a), as the millers alleged that a case or controversy arising under the laws or Constitution of the United States involving more than \$10,000 was presented; the existence of the jurisdictional amount is not disputed.

The district court, in an unreported memorandum and order, attached hereto as an Appendix, granted in part the relief requested, and the parties filed cross-appeals from the judgment. We have jurisdiction of these appeals under 28 USC §1291.

This case is a companion to *Rath Packing Co. v. Becker*, Nos. 73-2481, etc., decided concurrently herewith. For the sake of brevity in this opinion we shall refer at times to our opinion in *Rath*.

#### Background

This case concerns the packaging and weighing of flour sold to consumers for home use. The millers manufacture, package, label, and distribute in interstate commerce wheat flours, which are within the definition of "food" in the federal Food, Drug, and Cosmetic Act (FDCA), 21 USC §301 et seq., and are considered

<sup>1</sup>Section 2281 provides:

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

"consumer commodities" under the federal Fair Packing and Labeling Act (FPLA), 15 USC §§1451-1461.

Packaged flour is hygroscopic, and gains or loses moisture depending on the ambient humidity, unless packaged in airtight containers. If the relative humidity of the surrounding air is less than 60%, flour loses moisture, and hence weight. The converse is true at relative humidities above 60%. During the course of good distribution practices the ambient relative humidity is often less than 60%, and the packages of flour often lose weight. At the time the flour was packed, it contained 13-14% water by weight, which is within the identity standard for flour promulgated by the Secretary of Health, Education, and Welfare pursuant to 21 USC §341 in regulations set forth at 21 CFR 15.1. Jones conceded at argument before the district court that the compliance of the packages of flour with the federal weight labeling standards discussed *infra* when they left the millers' plants was not a material issue of fact. We take this to mean that, for the purposes of this case, the millers' flour was correctly labeled as to net weight under federal law when it left their plants.

#### Federal Statutes and Regulations

The federal statutory provisions covering the labeling of flour are found in the FDCA and the FPLA. Section 403 of the FDCA, 21 USC §343, provides:

A food shall be deemed misbranded—

• • • • •

(e) If in package form unless it bears a label containing (1) the name and place of business of the manufacturer, packer, or distributor; and (2) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count: *Provided*, That under clause (2) of this subsection reasonable variations shall be permitted, and exemptions as to small packages shall be established, by regulations prescribed by the Secretary.

In 21 CFR 1.8b(q) the Secretary purported to implement the proviso:

(q) The declaration of net quantity of contents shall express an accurate statement of the quantity of contents of



the package. Reasonable variations caused by loss or gain of moisture during the course of good distribution practice or by unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large.

Under the FPLA, Section 3, 15 USC §1452, provides:

(a) It shall be unlawful for any person engaged in the packaging or labeling of any consumer commodity (as defined in this chapter) for distribution in commerce, or for any person (other than a common carrier for hire, a contract carrier for hire, or a freight forwarder for hire) engaged in the distribution in commerce of any packaged or labeled consumer commodity, to distribute or cause to be distributed in commerce any such commodity if such commodity is contained in a package, or if there is affixed to that commodity a label, which does not conform to the provision of this chapter and of regulations promulgated under the authority of this chapter.

Section 4 of the FPLA, 15 USC §1453, contains the FPLA's labeling standards:

(a) No person subject to the prohibition contained in section 1452 of this title shall distribute or cause to be distributed in commerce any packaged consumer commodity unless in conformity with regulations which shall be established by the promulgating authority pursuant to section 1455 of this title which shall provide that—

• • • • •

(2) The net quantity of contents (in terms of weight, measure, or numerical count) shall be separately and accurately stated in a uniform location upon the principal display panel of that label • • •.

The FPLA is tied to the FDCA by Section 7 of the FPLA, 15 USC §1456:

(a) Any consumer commodity which is a food, drug, device, or cosmetic, as each such term is defined by section 321 of Title 21, and which is introduced or delivered for introduction into commerce in violation of any of the provi-

sions of this chapter, or the regulations issued pursuant to this chapter, shall be deemed to be misbranded within the meaning of sections 331 to 337 of Title 21 • • •.

### California Laws and Regulations

The California regulatory scheme depends upon two provisions of the California Business and Professions Code. Section 12211 of the Code provides in material part:

Each sealer shall, from time to time, weigh or measure packages, containers or amounts of commodities sold, or in the process of delivery, in order to determine whether the same contain the quantity or amount represented and whether they are being sold in accordance with law.

• • • • •

Any such rule or regulation, or amendment thereof, shall be adopted and promulgated by the director in conformity with the provisions of • • • [various sections] of the Government Code; provided, that the *average weight* or measure of the packages or containers in a lot of any such commodity sampled *shall not be less*, at the time of sale or offer for sale, *than the net weight* or measure stated upon the package, and provided further, that *said rules or regulations* applicable to food as defined in Section 26450 of the Health and Safety Code, insofar as possible, *shall not require higher standards and shall not be more restrictive than regulations, if any, promulgated* by the Department of Health, Education, and Welfare, Food and Drug Administration, *under the provisions of the Federal Food, Drug and Cosmetic Act.*

• • • • •

Whenever a lot or package of any commodity is found to contain, through the procedures authorized herein, a less amount than represented, the sealer shall in writing order same off sale and require that an accurate statement of quantity be placed on each such package or container before same may be released for sale by the sealer in writing. The sealer may seize as evidence any package or container which is found to contain a less amount than that represented. [Emphasis added.]

Section 12607 of the Business and Professions Code, on which Jones also relies, provides in material part:

Whenever a consumer commodity is offered for sale, exposed for sale, or sold without a statement of net quantity appearing thereon \* \* \*, the sealer shall in writing order the commodity off sale and require that a correct statement of net quantity be placed on the commodity before the same may be released by the sealer.

The regulations implementing Sections 12211 and 12607 are in 4 Cal. Administrative Code ch. 8, subch. 2, as in *Rath*. The weighing and off-sale procedures described in our *Rath* opinion as applicable to bacon also apply to the flour herein, except, of course, that the tare in this case is the weight of an empty paper flour bag.

#### *Proceedings Below*

At various times from October to December 1972, inspectors under Jones' supervision examined at Riverside County food distributors bags of flour manufactured and packed by the millers and, finding that bags in certain lots were short weight under the California statutes and regulations described *supra*, ordered those lots of flour off sale. Jones ordered additional lots of flour off sale in July 1973, after the commencement of this action.

In April 1973 the millers brought this action against Jones for declaratory and injunctive relief against Jones' acts. Jones counterclaimed, alleging that he had ordered off sale some 30,618 bags of flour totalling 191,731 lbs. and requesting declarations antithetical to those requested by the millers and an injunction against continuing violations of California law by the millers. There are no pending or concluded proceedings in the state courts pertaining to the ordering off-sale of the millers' flour, so the jurisdictional problem discussed in part I of our *Rath* opinion is not present in this case.

The case was decided on the basis of cross-motions for summary judgment supported by affidavits. As shown in the Appendix to this opinion, the district court granted in part the relief requested. Both parties appealed the determinations adverse to them.

#### I

Before considering the merits of this controversy we must decide whether the single district judge correctly denied the millers' motion for the convening of a three-judge district court under 28 USC §2281. If the district court was in error, we would have to remand this case for a new trial by a three-judge court, as the single judge below would have lacked jurisdiction on the subject matter. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 153 (1963); C. Wright, *Law of Federal Courts*, §50 (2d Ed., 1970). We hold that the action was properly heard and decided by a single judge for the reasons discussed below.

In a suit to enjoin the enforcement of a state law or regulation claimed to be contrary to the federal constitution, 28 USC §2281 has been construed to require a three-judge district court to hear the action only if the constitutional question presented is substantial. A question is insubstantial if it is "obviously without merit or because its unsoundness so clearly results from the previous decisions of this [the United States Supreme] court as to foreclose the subject \* \* \*." *Ex parte Poresky*, 290 U.S. 30, 32 (1933); *Swift & Co. v. Wickham*, 382 U.S. 111, 115 (1965); *California Water Service Co. v. City of Redding*, 304 U.S. 252, 255 (1938).

The contention that California's regulatory scheme is rendered invalid by the Commerce Clause *alone* is not substantial. The regulation of weights and measures has historically been, and is now, a matter of local concern and within the competent exercise of the police power of the States. See Judge Friendly's historical analysis for the district court in *Swift & Company v. Wickham*, 230 F. Supp. 398, 402-403 (S.D. N.Y. 1964); *appeal dismissed*, 382 U.S. 111 (1965), *aff'd.*, 364 F.2d 241 (2d Cir. 1966); see also *Savage v. Jones*, 225 U.S. 501 (1912). Any holding that the enforcement of state weights and measures regulations by California unreasonably burdens interstate commerce is foreclosed by the Supreme Court's decision in *Sligh v. Kirkwood*, 237 U.S. 52 (1915), in which the Court held that a Florida law which made the delivery of immature citrus fruit for shipment in interstate commerce a criminal offense was a valid exercise of Florida's police power and did not unreasonably burden interstate commerce. We note a claim that a state law is invalid because of conflict with federal law enacted pursuant to the power of Congress



under the Commerce Clause to regulate interstate commerce does not raise a constitutional question under the Commerce Clause requiring resolution of the issue by a three-judge court. *Swift & Co. v. Wickham*, *supra*, 382 U.S. at 120, 128.

Similarly, the millers' contention that the ordering of their flour off sale by Jones without a prior hearing violates Fourteenth Amendment due process is without substance. In *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599-600 (1950), the Court held that the seizure without a prior hearing of allegedly misbranded articles under Section 304(a) of the Food, Drug, and Cosmetic Act, 21 USC §334(a), did not violate due process. This holding was specifically approved by the Court in *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 339 (1969), as one directed to those special circumstances in which the important governmental or general public interest permits postponement of notice and an opportunity for a hearing without the deprivation of due process. See *Fuentes v. Shevin*, 407 U.S. 67, 90-93 (1972), for a discussion of the range of circumstances in which postponement of hearing is consistent with due process requirements.<sup>2</sup> Since California has adequate procedures by which the propriety of off-sale orders may be tested after the fact, by petition for writ of mandamus or action for injunction under state law, this contention of the millers is foreclosed and without substance. We perceive no difference in substance between California's undisputed interest in protecting its citizens from packaged articles which bear inaccurate weight information on them and the interests discussed in *Sniadach* and *Fuentes* whose nature permits seizure of property without prior hearing.

## II

In finding that 21 CFR 1.8b(q), *supra*, was invalid, the district court referred to the reasoning it employed in *Rath Packing Co. v. Becker*, 357 F. Supp. 529 (C.D. Cal. 1973), to invalidate the analogous regulation under the Wholesome Meat Act of 1967, 21

<sup>2</sup>The subsequent uncertainty in the scope of the *Fuentes* holding created by *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974), and fanned afresh by *North Georgia Finishing Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975), does not affect the continuing validity of Part VI of the Court's opinion in *Fuentes*.

USC §601 et seq. In *Rath* the district court said, 357 F. Supp. at 534 (emphasize in original, footnotes omitted):

Defendants argue, however, that section 317.2(h)(2) is void for vagueness; that, therefore, we are left with the absolute standard, "an accurate statement of . . . weight". Though valid, this argument does not end the inquiry in favor of state action. California Article 5—though measuring the absolute provided in California Business and Professions Code section 12211—applies a statistical "averaging" concept for the sealer to make the final determination of whether or not packages in violation should be ordered "off-sale". The federal Wholesome Meat Act of 1967 does not give state legislatures or state officers—even in the grant of concurrent enforcement jurisdiction—the right to substitute their judgment of what variances, either plus or minus come within the absolute standard of "an accurate statement of . . . in terms of weight." 21 U.S.C. § 601(n)(5)(B). Plaintiff argues the validity of 9 C.F.R. §317.2(h)(2), citing the Supreme Court sanction of a similar statute in *United States v. Shreveport Grain & Elevator Company*, 287 U.S. 77, 53 S.Ct. 42, 77 L.Ed 175 (1932).

But *Shreveport*, *supra*, does not reach the regulation under consideration here. In *Shreveport*, *supra*, the primary standard was given vitality because the "rules and regulations . . . deal with the entire subject in detail under the recital, '(i) the following tolerances and variations' . . ." (Emphasis added.) The Court then goes on to say at page 84, 53 S.Ct. at page 44:

" . . . Then follows an enumeration of discrepancies due to errors in weighing which occur in packing conducted in compliance with good commercial practice; . . . "

What *Shreveport*, *supra*, is telling us is that the statutory delegation is viable. It does not give viability to a redelegation that is subject to different enforcement resulting in varying degrees of reasonableness. The statute [21 U.S.C. §601(n)(5)] gives the Secretary the power of definition of "reasonable variations." The Secretary here has completely failed to accept the duty that can be expressed only in rules and regulations properly promulgated pursuant to federal law. Section 317.2(h)(2) is void for its inadequacy to set any recognizable

standard upon which any individual may measure his conduct or his compliance with the law by which he must order his personal or business life.

The provision of the Wholesome Meat Act analogous to 21 USC §343(e) of FDCA, *supra*, is 21 USC §601(n)(5), referred to by the court in the above quotation from *Rath*.

For the reasons given in Part II of our opinion in *Rath*, we do not concur in the district court's reasoning from the *Shreveport Grain* case or in its opinion that the use of the term "reasonable" in 21 CFR 1.8b(q) fails to give persons adequate notice of the variations from accurate weight which the Secretary will countenance in the enforcement of the FDCA. We hold 21 CFR 1.8b (q) is valid and forms part of the federal labeling standard under the FDCA.

### III

The differences between the FDCA and FPLA, on the one hand, and the Wholesome Meat Act of 1967, on the other, require a different analysis of the preemption issue from the analysis we employed in part III of our *Rath* opinion.

We find no unmistakable Congressional mandate that the FDCA and FPLA exclude weights and measures regulations by the States which impose standards which differ from the federal standards set by those statutes and any regulation promulgated thereunder. See *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

First, as explained in Part I of this opinion, weights and measures regulations are normally within the exercise of the States' police powers, and are not subject matter of a nature demanding exclusive federal regulation in order to achieve uniformity vital to national interests. Cf. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

Second, the statutory language and the legislative history of the FDCA and FPLA fail to demonstrate the same Congressional intent to displace state regulation which we found in *Rath*. The FDCA contains no express preemptive language. Sections 11 and 12 of the FPLA, 15 USC §§1460 and 1461, provide as follows:

§1460. . . .

Nothing contained in . . . [the FPLA] shall be construed to repeal, invalidate, or supersede—

- (a) the Federal Trade Commission Act or any statute defined therein as an antitrust Act;
- (b) the Federal Food, Drug, and Cosmetic Act; or
- (c) the Federal Hazardous Substances Labeling Act.

§1461. . . .

It is thereby declared that it is the express intent of Congress to supersede any and all laws of the States or political subdivisions thereof insofar as they may now or hereafter provide for the labeling of the net quantity of contents of the package of any consumer commodity covered by this chapter which are less stringent than or require information different from the requirements of section 1453 of this title or regulations promulgated pursuant thereto. [Emphasis added.]

The scope of state labeling<sup>3</sup> regulations not preempted, and thus permitted, by §1461 is whatever is not "less stringent" than the FPLA's requirement, which, as stated in 15 USC §1453, is that labels "separately and accurately" state the net quantity of contents. This is a wide sweep indeed, not in keeping with an express Congressional intent to preempt all state standards different from the federal standard.

The legislative history of the FPCA shows a regard in the Congress for the exercise of State police power. H.R. Rep. No. 2118, 59th Cong., 1st Sess., March 7, 1906, states with respect to the first federal Food and Drug Act, which has evolved into the FDCA:

It is not proposed by the bill to interfere in any way with the power of the State officials over local trade, but the purpose of the bill is to give to State officials the aid of the National Government and to receive from the State officials their aid in the enforcement of the national law.

<sup>3</sup>We see no difference in substance between "misbranding" and "mislabeling" in this case. 15 USC §1456 defines "misbranding" to include violations of 15 USC §1453, which Jones argues pertains only to "labeling requirements." We think Jones' argument lacks substance.



We are not aware of any intervening change in the intent of Congress with respect to the impact of the FDCA on state regulation.

In a similar vein, S. Rep. No. 1186, 89th Cong., 2d Sess., May 25, 1966, on the FPLA, states:

Section 12 [15 USC §1461] provides that regulations promulgated under the act shall supersede State law only to the extent the States impose net quantity of contents labeling requirements which differ from requirements imposed *under the terms of the act*. The bill is not intended to limit the authority of the States to establish such packaging and labeling standards as they deem necessary in response to State and local needs. [Emphasis added.]

We cannot conclude that in the FDCA and FPLA Congress has evidenced an intent to displace *all* state regulation of the net weight statements appearing on labels affixed to "food" or "consumer commodities." This does not end our inquiry, however, since Congress has made it clear that the scope of exercise of the police power left to California is confined to the enforcement of standards which are not "less stringent" than the FPLA's standard of a "separate and accurate" net weight statement, or standards as to which the FPLA makes no corresponding requirements, which are not involved in this case. And, also, as stated in *Kelly v. Washington*, 302 U.S. 1, 10 (1937):

There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so "direct and positive" that the two acts cannot "be reconciled or consistently stand together."

We must therefore determine whether California's scheme impermissibly ~~conflicts with federal law; this is an inquiry different~~ from that where express preemption is involved. Cf. *Campbell v. Hussey*, 368 U.S. 297, 300 (1961). The "not less stringent" test

of 15 USC §1461 is *one* test for determining whether impermissible conflict exists, and it is a test specifically intended by Congress for use in this situation.

We note that, by virtue of the "savings provisions" of 15 USC §1460, compliance with the FDCA is to be considered compliance with the FPLA. By the same token, any state net weight labeling standard which is *not different* from the standard set forth in 21 USC §343(e) and 21 CFR 1.8b(q) cannot be considered "less stringent" than the FPLA standard.<sup>4</sup>

Our discussion in Part III of our *Rath* opinion disposes of this point on Cal. Bus. and Prof. Code §12211. The FDCA standard is virtually the Wholesome Meat Act standard verbatim. We held in *Rath* that §12211 and the regulations implementing it, 4 Cal. Admin. Code ch. 8, subch. 2, establish a different net weight labeling standard than the Wholesome Meat Act standard, because they fail to provide for the "reasonable variations" permitted by 9 CFR 317.2(h)(2). The same conclusion pertains here.

Section 12607, *supra*, presents a slightly different picture because of other provisions with which it must be construed. Cal. Bus. and Prof. Code §§12613 and 12614 provide in material part: §12613. \* \* \* If any provision of this chapter is less stringent or requires information different from any requirement of Section 4 of the Act of Congress entitled "Fair Packaging and Labeling Act" \* \* \* or of any regulation promulgated pursuant to such act, the provision shall be inoperative to the extent that it is less stringent or requires information different from any such federal requirement, in which event each such federal requirement is a part of this chapter.

§12614. \* \* \* When a commodity in a container is sold and there is a discrepancy between the actual quantity of the commodities in the container and the net quantity of the contents thereof indicated on the container or between the fill of the commodity in the container and the capacity of the container there is no violation of this chapter.

<sup>4</sup>To hold otherwise would create the anomalous situation in which a state scheme embodying the FDCA standard, including the reasonable variations of 21 CFR 1.8b(q), would violate 15 USC §1461 since it allowed variance from the strict accuracy standard of the FPLA, 15 USC §1453.

(a) If such discrepancy is due to unavoidable leakage, shrinkage, evaporation, waste, or causes beyond the control of the seller acting in good faith.

Sections 12607, 12613, and 12614 appear in a chapter of the Code different from that containing §12211. By virtue of the variation standard in §12614 the provision in §12607 that "the quantity of the contents so marked shall be the net amount of the commodity in the package or container" can be seen to establish a net weight labeling standard very similar to the FDCA standard, but which, by permitting variations arising from causes other than gain or loss of moisture, as specified in 21 CFR 1.8b(q), must be considered "different" from the FDCA standard, in the absence of §12613, as discussed *infra*.

We are, therefore, left with applying the "not less stringent" test. As we see it, it is not particularly relevant that California may order off sale packages of flour that comply with the FDCA and FPLA; a state scheme is "less stringent" than the federal scheme if it permits marketing of packages of flour that do not conform to the federal net weight labeling standards.

As explained in our *Rath* opinion, §12211 and the regulations in 4 Cal. Admin. Code ch. 8, subch. 2, evaluate compliance with net weight labeling standards solely by determining by statistical sampling techniques the average weight of a lot of packages, any of which may weigh more or less than the weight stated on its label. In a sense, by refusing to recognize any of the variations permitted by 21 CFR 1.8b(q), these provisions are stricter than the federal law. But §12211 only proscribes sale of lots of packages whose average actual weights are less than the label weights. The federal law requires "accurate" weight, proscribing packages that are overweight as well as underweight. We recognize that step 10 of the California procedure as described in the *Rath* opinion takes variations of individual packages from accurate weight into account in determining whether lots should be ordered off sale; but these variations are evaluated solely on a statistical basis, and may be greater than, as well as less than, the reasonable variations permitted each package by 21 CFR 1.8b(q) and may arise from circumstances not recognized by the federal regulation. We conclude that §12211 and 4 Cal. Admin. Code ch. 8, subch. 2, do permit the sale of packages of flour that do not comply with federal law.

There is an additional reason, of equal vitality with the above, for holding §12211 and 4 Cal. Admin. Code ch. 8, subch. 2, preempted by federal law. As the Court said in *Florida Lime & Avocado Growers, Inc. v. Paul*, *supra*, 373 U.S. at 142-43,

A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce, \* \* \* [citations omitted].

The record shows that California is a state of climatic extremes, with very dry as well as very wet areas inhabited by people who presumably consume flour. In order to comply at the retail level with the California standards, which do not recognize the variations of 21 CFR 1.8b(q), the millers would have to overpack bags intended for dry (less than 60% relative humidity) areas and underpack bags intended for wet areas in order to take into account the variations in bag weight caused by gain or loss of moisture. Such practice would, however, violate federal law, which requires accurate weight at the time of packaging, with reasonable variations caused by gain or loss of moisture being recognized only during the course of subsequent distribution. As a result of this conflict, the California scheme cannot stand.

Section 12607, standing as it does with the other provisions in its chapter of the Code with which it must be construed, presents a different situation. Section 12607 is not an average weight provision like §12211. Through the premission in §12614, *supra*, of variations of actual weight from label weight whose causes are not recognized by 21 CFR 1.8b(q), §12607 is less stringent than the FDCA, and thus the FPLA as well. For instance, weight loss caused by leakage of contents, permitted by §12607 through §12614, will result in actual weight being less than the "accurate" weight required by the FPLA on the label, without compliance with the FDCA. Section 12607 is saved from conflict with federal law, however, by §12613, *supra*, which substitutes the federal standard, as we have here explained it, for any less stringent California standard. In this situation, California must be deemed to have adopted the federal standard as its state standard, which it may do in the exercise of its police power, and §12607, read in context, does not conflict with federal law and is not invalid.



Jones' enforcement of §12607, however, brings into play our discussion of §12211 and 4 Cal. Admin. Code ch. 8, subch. 2, *supra*. We agree with the district court that the enforcement of §12211 and the regulation must be enjoined. The district court found that Jones implemented §12607 through the same regulation. Although §12607 alone is a valid exercise of California's police power, its enforcement through the regulation is not, for the reasons given *supra*.

We hold that the district court correctly enjoined the enforcement of, and declared invalid, §12211 of the Business and Professions Code and 4 Cal. Admin. Code ch. 8, subch. 2. The district court should not have declared §12607 of the Business and Professions Code invalid, but correctly enjoined the enforcement of §12607 through the procedures described in 4 Cal. Admin. Code ch. 8, subch. 2.

We have attempted to make it clear that by this decision we do not deprive California of its unquestioned right to exercise its police power in the regulation of weights and measures so as to prevent the sale to consumer of packaged flour and other foods which do not weight what their labels say they do. We find merely that certain statutes and regulations enacted by California in exercise of its police power conflict with federal law in such a manner that they are superseded by federal law. California is free to enact other statutes and regulations that do not suffer from this infirmity. Where proper state standards exist, Jones and other county directors of weights and measures may employ state procedures, including off-sale orders, to enforce the state law.<sup>5</sup>

#### IV

After the entry of the district court order, California promulgated a new regulation, 4 Cal. Admin. Code, ch. 8, subch. 2.1, to

• • • apply only during proceedings in the case of General Mills, Inc., et al. vs. Joseph W. Jones, etc., No. 73-715-R, United States District Court, Central District of California.

<sup>5</sup>The millers have not contended that the FDCA, FPLA, and state standards enforceable thereunder cannot be enforced at the retail level. Cf. Part IV of our *Rath* opinion. The off-sale order scheme used in California can, as we held in Part I of this opinion, *supra*, be used constitutionally to enforce a valid California weights and measures regulation program.

This Article is adopted as a temporary authority to protect California wholesalers, retailers, and consumers against short weight packages of flour and flour products. Flour products includes cake mixes, pancake mixes and similar products in which flour is the principal ingredient, but does not include processed products such as bread and pastry using flour or flour products as ingredients.

The district court, though asked to do so, refused to modify its order to enjoin the enforcement of subch. 2.1 as well.

This new regulation purports to apply "federal standards of accuracy to the products involved, which standards are coincident with California standards of accuracy." We find it falls short of its announced goal.

Only one section of the new regulation, §2970.2(a) need detain us on this point. It provides:

The sealer of weights and measures shall order off sale all packages which are found to be short weight under either procedure stated in Section 2970.1. He shall record on a form specified by the director the shortage determined for each package marked off sale.

We note this section follows the federal standard in considering the weights of individual packages and not just the average weight of a lot. We note also that no reasonable variations from stated weight, as in 21 CFR 1.8b(q), are permitted. However, this regulation permits the sale of overweight packages, and thus is less stringent than the "accurate" weight standard of federal law. Where no variations as stringent or more stringent than those allowed under the FDCA are provided for, California may not restrict the sale only of underweight packages, while letting overweight packages, which the FPLA deems improperly labeled, remain on sale. Furthermore, simultaneous compliance with federal law and subch. 2.1 is made physically impossible by California's failure to recognize reasonable variations from label weight as permitted by 21 CFR 1.8b(q). We hold that California may not enforce its weights and measures laws through the procedures of 4 Cal. Admin. Code ch. 8, subch. 2.1.<sup>6</sup>

<sup>6</sup>This holding and our holding in Part III, *supra*, render it unnecessary to decide the millers' claims that 4 Cal. Admin. Code ch. 8, subchs. 2 and 2.1 were not promulgated in accordance with California law.

## V

## CONCLUSION

In recapitulation, we hold:

(1) that the single judge below properly refused to convene a three-judge district court to hear and decide this case, since the constitutional issues raised in this case are not substantial;

(2) that the enforcement of valid state weights and measures laws through the use of off-sale orders prior to a hearing or opportunity for judicial review does not unreasonably burden interstate commerce or violate the due process clause of the Fourteenth Amendment to the Constitution of the United States;

(3) that the district court erred in invalidating 21 CFR 1.8b(q);

(4) that Cal. Bus. and Prof. Code §12211 and 4 Cal. Admin. Code ch. 8, subch. 2, impermissibly conflict with the standards imposed by the Food, Drug, and Cosmetic Act, the Fair Packaging and Labeling Act, and 21 CFR 1.8b(q), and that Jones was properly enjoined from enforcing those sections;

(5) that the district court erred in invalidating Cal. Bus. and Prof. Code §12607 but correctly enjoined its enforcement through 4 Cal. Admin. Code ch. 8, subch. 2; and

(6) that 4 Cal. Admin. Code ch. 8, subch. 2.1, impermissibly conflicts with the standards imposed by the Food, Drug, and Cosmetic Act, the Fair Packaging and Labeling Act, and 21 CFR 1.8b(q), and may not be used as the basis for procedures enforcing California law.

Accordingly, the judgment of the district court is affirmed in part, reversed in part, and the case is remanded for entry of an amended order in conformance with this opinion.

## APPENDIX

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

GENERAL MILLS, INC., a corporation; THE  
PILLSBURY COMPANY, a corporation; SEA-  
BOARD ALLIED MILLING CORPORATION, a  
corporation,

*Plaintiffs and Counterdefendants,*

vs.

JOSEPH W. JONES as Director of the County  
of Riverside Department of Weights and  
Measures,

*Defendant and Counterclaimant.*

CIVIL ACTION  
No. 73-715-R

MEMORANDUM  
OPINION  
AND ORDER

Plaintiffs and defendants by cross motion for summary judgment invite the Court to revisit its decision in *Rath Packing Company v. Becker, et al.*, 357 F. Supp. 529 [C.D. Cal. 1973], advocating reversal or modification of views expressed therein.

Factually, this case is indistinguishable from *Rath, supra*, except that wheat flour is the commodity involved instead of meat, thereby substituting the application of the Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040, 21 U.S.C. § 301 et seq. Et. Seq. in place of the federal Wholesome Meat Act of 1967, 21 U.S.C. § 601 et seq.

Defendant, JOSEPH W. JONES, the Director of County of Riverside, Department of Weights and Measures, has, in the performance of his duties, through inspectors employed in his department, ordered off-sale wheat flour products of each of the plaintiffs pursuant to the provisions of California Business and Professions Code, sections 12211 and 12607, as implemented by Title 4, California Administrative Code, Chapter 8, subchapter 2.

Defendant continues to apply the state requirements held invalid in *Rath, supra*. The suggestion in *Rath, supra*, that state officers "have available to them a federal statutory scheme which, when properly executed by state . . . officers, secures to the American homemaker the assurance that expected wholesomeness and value



is received for each consumer dollar spent," at 535, is misread by defendant when he insists on using *state standards as the measure* for determining misbranding or mislabeling. Federal standards preempt state law. Off-sale orders and other state procedures are available to state officers, but only to assure compliance with those requirements of federal law provided in the Federal Food, Drug, and Cosmetic Act and federal Fair Packaging and Labeling Act as they may be applied to plaintiff's products. The enactment of these same *federal* standards as state law is another alternative available for the protection of California consumers.

Plaintiffs' position here is no different than the plaintiff in *Rath, supra*. Here 21 C.F.R., Section 1.8(b)(q) suffers from the same infirmity as did 9 C.F.R. 317.2(h)(2) in the *Rath, supra*, case. The Secretary has failed to express tolerances which may be the "reasonable variations" of the regulation. Without such an expression—from the Secretary—each enforcement officer is left to his own personal standard of what is reasonable. So long as the Secretary does not act to correct this inadequacy in the regulations, enforcement officers are left with the absolute standard of the statute that each package must contain as part of its label "an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count".

The state standard applied by defendant does not meet the measure.

No constitutional question is presented by plaintiffs which require [sic] resolution by a three-judge court.

Accordingly,

IT IS ORDERED:

1. That defendant, together with his deputies, inspectors, officers, agents, servants, employees, attorneys and other persons in active concert or participation with him are jointly and severally restrained and enjoined from applying the provisions of California Business and Professions Code, sections 12211 and 12607, and/or the provisions of Title 4, California Administrative Code, Chapter 8, subchapter 2, to the products of plaintiffs, which have been subjected to the provisions of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 301 et seq., and/or the federal Fair Packaging and Labeling Act and any valid regulation promulgated pursuant thereto.

2. The Court reserved the continuing jurisdiction to make any modification to the injunction contained herein upon proper application by any party, as the ends of justice may require.
3. The motion for a three-judge court is denied.
4. The motion of defendant for summary judgment is denied.
5. Except as herein expressly provided, the motion for summary judgment of plaintiffs is denied.

Dated: September 17, 1973.

/s/ Manuel L. Real  
United States District Judge

**APPENDIX.**

The Rath Packing Company, a corporation, Plaintiff and Counter-Defendant, v. M. H. Becker as Director of the County of Los Angeles Department of Weights and Measures, Defendant, C. B. Christensen as Director of Agriculture of the State of California, Intervenor.

The Rath Packing Company, a corporation, Plaintiff, v. The People of the State of California, Joseph W. Jones as Director of the County of Riverside Department of Weights and Measures, Defendants. Civ. A. Nos. 72-607-R, 72-608-R. United States District Court, C. D. California. April 3, 1973.

Gibson, Dunn & Crutcher, Sherman Welpton, Jr., Dean C. Dunlavey, Los Angeles, Cal., for plaintiff.

John Maharg, County Counsel, Arnold K. Graham, Deputy County Counsel, Los Angeles, Cal., for M. H. Becker.

Ray T. Sullivan, Jr., County Counsel, Loyal E. Keir, Deputy County Counsel, Riverside, Cal., for Joseph W. Jones.

Evelle J. Younger, Atty. Gen. of Cal., Carl Boronkay, Asst. Atty. Gen., Herschel T. Elkins and Allan J. Goodman, Deputy Attys. Gen., for Intervenor C. B. Christensen.



MEMORANDUM OPINION  
AND ORDER

REAL, District Judge.

These matters have been consolidated for decision after trial of Case No. 72-607-R, and hearing of cross-motions for summary judgment in case No. 72-608-R. The facts of both cases have much commonality with little or no dispute of the facts necessary to disposition of both cases.

Plaintiff, The Rath Packing Company, (hereinafter Rath), is a meat processor subject to inspection pursuant to the terms of the federal Wholesome Meat Act of 1967, 21 U.S.C. § 601 et seq.

Defendants M. H. Becker (hereafter Becker) and Joseph W. Jones (hereafter Jones) are Directors of County Department of Weights and Measures of Los Angeles and Riverside Counties respectively. C. B. Christensen, as Director of Agriculture of the State of California has heretofore been granted leave to intervene in the Becker action and has participated in presenting the defense in that action.

The controversy arises out of the actions of Becker and Jones through their respective deputies of ordering off-sale meat products delivered by Rath to retail stores found to be short of the weight stated on the label. Determination of short-weight has been made in each case by the application of the provision of Title 4, California Administrative Code, Chapter 8, subchapter 2, Article 5.

Fundamental to resolution of the validity of Becker and Jones' actions is a determination of the reach of the federal Wholesome Meat Act of 1967, 21 U.S.C.

§ 601 et seq., *i.e.*, preemption by the federal government of the regulation of meat and meat products.

The federal Wholesome Meat Act of 1967 was enacted by Congress with the finding that:

“... Unwholesome, adulterated, or misbranded meat or meat food products impair the effective regulation of meat and meat food products in interstate or foreign commerce, are injurious to the public welfare, destroy markets for wholesome, not adulterated, and properly labeled and packaged meat and meat food products, and result in sundry losses to livestock producers and processors of meat and meat food products, as well as injury to consumers.” 21 U.S.C. § 602.

A reading of the statutory scheme together with the legislative history<sup>1</sup> demonstrates clearly, in the context of our concern here, that Congress intended to broaden federal regulation of meat and meat food products to cope with adulteration, unwholesomeness and misbranding for the welfare of consumers.

The essence of the controversy here is found in Congressional enactment of Title 21, United States Code, Section 601(n) which provides:

“(n) The term ‘misbranded’ shall apply to any . . . meat or meat food product under one or more of the following circumstances:

(5) if in a package or other container unless it bears a label showing . . . (B) an accurate statement of the quantity of the contents in terms of weight, measure or numerical count: Provided, That under Clause (B) of this subparagraph (5), reasonable variations may be permitted, . . . by regulations prescribed by the Secretary.”

<sup>1</sup>U.S. Code Congressional and Administrative News, 90th Congress, First Session, 1967, pages 2188-2213.

Rath claims that it meets the criteria of 21 U.S.C. § 601(n)(5) when its products are considered under the application of regulations published by the Secretary of Agriculture in 9 C.F.R. § 316.1 et seq. and 21 U.S.C. § 607(b).

21 U.S.C. § 607(b) provides in its pertinent part:

“(b) All . . . meat and meat food products inspected at any establishment under the authority of this subchapter . . . shall at the time they leave the establishment bear, in distinctly legible form, directly thereon or on their containers . . . the information required under paragraph (n) of section 601 of this title.”

Rath argues that section 607(b) limits the inquiry of accurate weight to the time meat or meat food products leave a processor's plant under federal inspection. Rath here argues for too much. To complete the regulatory scheme and maintain continuing enforcement, Congress gave federal meat inspectors the power of seizure of adulterated or misbranded meat or meat food products at any level of distribution. 21 U.S.C. § 673 makes clear that the provisions of section 601(n) (1-12) can be applied to packages of meat or meat food products at the ultimate end of a meat processor's distribution system—the retail store.

The defendants so argue—but they fall short in the recognition of what it is they are permitted to do by the federal Wholesome Meat Act of 1967. The provisions of 21 U.S.C. § 679 limit the state in clear and unequivocal language. Therein, the states are admonished that “. . . [M]arking, labeling, packaging or ingredient requirements in addition to, or

different than, those made under this chapter may not be imposed by any State . . . with respect to articles prepared at any establishment under inspection in accordance with the requirements under subchapter I of this chapter. . . .” Rath is clearly within these requirements.

Defendants defend their acts and rely—as the source of their authority and practice—upon state statutes. We now proceed to analyze that state statutory scheme to determine whether it meets the limitations of 21 U.S.C. § 678 when applied to the products of Rath.

Defendants cite as their primary source California Business and Professions Code section 12211 which provides in its pertinent part:

“§ 12211. Weighing or measuring commodities sold or being delivered; rules and regulations; off sale order; evidence. Each sealer shall . . . weigh or measure packages, containers or amounts of commodities sold, or in the process of delivery, in order to determine whether the same contain the quantity or amount represented. . . .

The director is hereby authorized and directed to adopt and promulgate necessary rules and regulations governing the procedures to be followed by sealers . . . in determining whether any package or container or a lot of such packages or containers complies with the provisions of this section.

\* \* \*

Whenever a lot or package of any commodity is found to contain . . . a less amount than that represented, the sealer shall in writing order same off sale. . . .”



Following the direction of the California legislature, the Director of Agriculture of the State of California has published in Title 4, California Administrative Code, Chapter 8, subchapter 2, Article 5 (hereafter Article 5) a comprehensive procedure for testing commodities to determine their compliance with California Business and Professions Code section 12211. In a detailed step by step process, the sealer is led to the determination of whether or not the commodities in question "contain a lesser amount than represented". The procedure is a statistical determination based upon normal and proven statistical standards. As such, the result can be no better than the objective, and the stated objective of Article 5 is to determine by sampling techniques the qualification of a lot of commodities to the requirements of section 12211, *i.e.*, that the quantity represented on the label is what the package contains. These techniques are questioned by Rath as contravening the prohibition against adding to or differing from the labeling requirements of the federal Wholesome Meat Act of 1967. Defendants argue validity, urging that preemption by the federal government is limited by 21 U.S.C. § 678 when it provides:

"... but any State or Territory or the District of Columbia may, consistent with the requirements under this chapter, exercise concurrent jurisdiction with the Secretary over articles required to be inspected under said subchapter I, for the purpose of preventing distribution . . . of any such articles which are adulterated or misbranded and are outside of such an establishment. . . ."

It is clear in the provisions for concurrent jurisdiction outside an inspected plant that such actions as are

undertaken by states in the regulation of meat and meat food products must be *consistent* with the requirements of the federal Wholesome Meat Act of 1967. That Act has spoken upon the subject of misbranding—and more particularly when misbranding is related to comparison of the label with contents as provided in 21 U.S.C. § 601(n)(5) in this language:

"(n) The term 'misbranded' shall apply to any . . . meat or meat food product . . .

\* \* \*

(5) if in a package or other container unless it bears a label showing . . . (B) an accurate statement of quantity . . . in terms of weight . . . : Provided, That under clause (B) of this subparagraph (5) reasonable variations may be permitted . . . by regulations prescribed by the Secretary."

To implement subsection (5), the United States Secretary of Agriculture published rules and regulations in Title 9, Code of Federal Regulations. In section 317.2(h)(2) the Secretary provides:

"(2) The statement as it is shown on a label shall not be false or misleading and shall express an accurate statement of the quantity of contents of the container exclusive of wrappers and packing substances. Reasonable variations caused by loss or gain of moisture during the course of good distribution practices or by unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large."

California Article 5 just does not meet this federal standard. Nowhere in the measuring processes set forth

therein in detail is any consideration given to the possible "loss . . . of moisture during the course of good distribution practice." The measure of Article 5 is "absolute" as determined by accepted statistical methods and, as such, erroneously encroaches upon the standards provided by the federal Wholesome Meat Act of 1967.

Defendants argue, however, that section 317.2(h)(2) is void for vagueness; that, therefore, we are left with the absolute standard, "an accurate statement of . . . weight". Though valid, this argument does not end the inquiry in favor of state action. California Article 5—though measuring the absolute provided in California Business and Professions Code section 12211—applies a statistical "averaging" concept for the sealer to make the final determination of whether or not packages in violation should be ordered "off-sale". The federal Wholesome Meat Act of 1967 does not give state legislatures or state officers—even in the grant of concurrent enforcement jurisdiction—the right to substitute their judgment of what variances, either plus or minus come within the absolute standard of "an accurate statement of . . . in terms of weight." 21 U.S.C. § 601(n)(5)(B). Plaintiff argues the validity of 9 C.F.R. § 317.2(h)(2), citing the Supreme Court sanction of a similar statute in *United States v. Shreveport Grain & Elevator Company*, 287 U.S. 77, 53 S.Ct. 42, 77 L.Ed. 175 (1932).

But *Shreveport, supra*, does not reach the regulation under consideration here. In *Shreveport, supra*, the primary standard was given vitality because the "rules and regulations . . . deal with the *entire subject in detail* under the recital, '(i) the following tolerances

and variations'. . . ." (Emphasis added.) The Court then goes on to say at page 84, 53 S.Ct. at page 44:

" . . . Then follows an enumeration of discrepancies due to errors in weighing which occur in packing conducted in compliance with good commercial practice;. . ."

What *Shreveport, supra*, is telling us is that the *statutory* delegation is viable. It does not give viability to a redelegation that is subject to different enforcement resulting in varying degrees of reasonableness. The statute [21 U.S.C. § 601(n)(5)] gives the Secretary the power of definition of "reasonable variations". The Secretary here has completely failed to accept the duty that can be expressed only in rules and regulations properly promulgated pursuant to federal law.<sup>2</sup> Section 317.2(h)(2) is void for its inadequacy to set any recognizable standard upon which any individual may measure his conduct or his compliance with the law by which he must order his personal or business life.<sup>3</sup>

Conceding the invalidity of section 317.2(h)(2) to defendants, they now argue that the state is free to set its own standards of "reasonable variations" citing *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248, rehearing denied, 374 U.S. 858, 83 S.Ct. 1861, 10 L.Ed.2d 1082. The error of such dependence on *Florida Lime*,

<sup>2</sup>5 U.S.C. §§ 551-559.

<sup>3</sup>Under the regulation as it is written one meat inspector may conclude that x% loss of moisture can be expected. Given the same factual context, another meat inspector may come to the conclusion that y% loss of moisture is reasonable. Delegation of "administrator's function" has never included giving each enforcement officer the "keys to the jailhouse".



*supra*, is evidenced by the recognition by the Supreme Court, beginning at page 142, 83 S.Ct. 1210, that Congress had not foreclosed activity by the states where it can be reconciled with federal regulation. Here the defendants attempt to justify the California statutory scheme by a misunderstanding that labeling, qua labeling, is what the federal Wholesome Meat Act of 1967 is all about and that California's statute is aimed at misbranding. This conclusion is erroneous for two reasons:

1. Congress has defined "misbranding".
2. "Misbranding" has no meaning except insofar as it describes a departure from the labeling description of a commodity within a package.<sup>4</sup>

The Court is aware of the admonition in *Florida Lime, supra*, in measuring preemption when the Supreme Court says at page 142, 83 S.Ct. at page 1217:

"The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."

The Congress here has left no doubt. It is *the* provisions of *the* federal Wholesome Meat Act of 1967 that are applicable to mislabeling or misbranding that must be applied. Neither state legislatures nor state officers can add or subtract from those definitions.

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<sup>4</sup>Each of the twelve categories of misbranding described in 21 U.S.C. § 601(n) refers to, in some way, a label. Common sense tells us that mislabeling and misbranding are synonymous terms.

If administrative definition of "reasonable variances" is desirable, it is the United States Secretary of Agriculture who must speak. When he fails to speak or misspeaks his authority, the state cannot substitute its voice. Defendants here do not, in any sense of the word, pretend to be applying federal statutory standards. The enforcement of California Business and Professions Code section 12211 and its implementation in California Administrative Code Article 5 exceeds the concurrent enforcement rights of the state and its officers.

This conclusion should not in any way be taken to mean that state officers (sealers) cannot continue their stated mission to protect consumers of their respective jurisdictions. They have available to them a federal statutory scheme which, when properly executed by state or federal officers, secures to the American homemaker the assurance that expected wholesomeness and value is received for each consumer dollar spent. That the evidence here shows the United States Department of Agriculture may have abdicated some of its protective duty, does not justify the application of a *different* labeling requirement by the state of California and its officers.

The claimed exemptions by Rath of its meat and meat food products do not—if beyond the preemption standards recognized herein—need resolution to fully determine the controversy between the parties.

In case No. 72-607-R judgment shall be entered for plaintiff.

In case No. 72-608-R the motion for summary judgment of defendant is denied. The motion for summary judgment of plaintiff is granted.

Accordingly,

It is ordered:

1. That defendants and intervenor in case No. 72-607-R, and defendants in case No. 72-608-R, together with their respective deputies, inspectors, officers, agents, servants, employees, attorneys and other persons in active concert or participation with them, and each of them, are restrained and enjoined permanently from applying the provisions of California Business and Professions Code section 12211 and/or the provisions of Title 4, California Administrative Code, Chapter 8, subchapter 2, Article 5, to articles prepared and marketed by plaintiff under United States Department of Agriculture's inspection in accordance with the requirements of the federal Wholesome Meat Act of 1967 [21 U.S.C. § 601 et seq.].

2. The Court reserves the continuing jurisdiction to make any modification to this injunction upon proper application by any party, as the ends of justice may require.

**California Business and Professions Code Section 12211**  
[Stats. 1939, C. 43, p. 450, as Amended Stats. 1949, C. 1384, p. 2407; Stats. 1957, c. 1658, p. 3038, Stats. 1963, c. 353].

*Weighing or measuring commodities sold or being delivered; rules and regulations; off sale order; evidence*

Each sealer shall, from time to time, weigh or measure packages, containers or amounts of commodities sold, or in the process of delivery, in order to determine whether the same contain the quantity or amount represented and whether they are being sold in accordance with law.

The director is hereby authorized and directed to adopt and promulgate necessary rules and regulations governing the procedures to be followed by sealers in connection with the weighing or measuring of amounts of commodities in individual packages or containers or lots of such packages or containers, including the procedures for sampling any such lot, and in determining whether any package or container or a lot of such packages or containers complies with the provisions of this section. . . .

Any such rule or regulation, or amendment thereof, shall be adopted and promulgated by the director in conformity with the provisions of Chapter 4.5 (commencing with Section 11371), of Part 1 of Division 3 of Title 2 of the Government Code; provided, that the average weight or measure of the packages or containers in a lot of any such commodity sampled shall not be less, at the time of sale or offer for sale, than the net weight or measure stated upon the package, and provided further, that said rules



or regulations applicable to food, as defined in Section 26450 of the Health and Safety Code, insofar as possible, shall not require higher standards and shall not be more restrictive than regulations, if any, promulgated by the Department of Health, Education, and Welfare, Food and Drug Administration, under the provisions of the Federal Food, Drug and Cosmetic Act.<sup>2</sup>

Any lot or package of any such commodity which conforms to the provisions of this section shall be deemed to be in conformity with the provisions of this division relating to stated net weights or measures.

Whenever a lot or package of any commodity is found to contain, through the procedures authorized herein, a less amount than that represented, the sealer shall in writing order same off sale and require that an accurate statement of quantity be placed on each such package or container before same may be released for sale by the sealer in writing. The sealer may seize as evidence any package or container which is found to contain a less amount than that represented.

#### **Title 4 California Administrative Code, Vol. 4, p. 271.**

##### **Article 5. Sampling and Testing Procedure for Estimating Container Fill of Packaged Commodities Definitions**

2930. *Application of Definitions.* The definitions in this article apply to this article only and do not affect the provisions of any other article, chapter or subchapter.

NOTE: Authority cited for new Article 5 (§§2930 through 2933.3.20): Section 12027, Business and Pro-

fessions Code. Reference: Section 12211, Business and Professions Code.

*History:* 1. *New article* (§§2930 through 2933.3.20) filed 12-30-60; effective thirtieth day thereafter (Register 61, No. 1).

2931. *Container.* "Container" means any receptacle or carton, whether lidded or unlidded, into which a commodity is packed or placed, or any wrappings with or into which any commodity is wrapped or put for sale.

2931.1. *Package.* "Package" means any consumer size "container" and its contents.

2931.2. *Tare Material.* "Tare Material" shall be synonymous with "Container," and "Tare" shall be construed to be the weight of such tare material.

2931.3. *Lot; Sub-lot.* "Lot" means the total number of packages of a single item of merchandise in a single size at one location and may contain two or more "sub-lots."

"One location" shall be construed to mean "one display" or "one grouping," and does not, for example, mean all items of the same brand and size stored or kept for sale in one establishment.

(a) "Sub-lot" refers to those packages of merchandise within either a "Standard-Pack" lot or "Random-Pack" lot which can be readily identified by a similar or uniform "Lot-Symbol" or grouping.

2931.4 *Lot-Symbol.* "Lot-Symbol" means the word, letter or numeral (or combination of these), used by the packer or manufacturer to identify packages which were packed or shipped at a given time.

2931.5. *Classes of Prepackaged Commodities.*

(1) "Standard-Pack" means consumer size packages of a uniform weight, measure or count, of the same brand or identification.

(b) "Random-Pack" means consumer size packages of the same brand or identification but of varying weight, volume, or count.

2931.6. *Sample.* "Sample" designates the group of packages or containers used for testing purposes.

(a) "Package Sample Size" shall be as noted in "Procedure," 2933.3, Table I, Column "B" and shall be based on Column "A" "Lot Size."

(b) "Sub-groups" shall be formed by recording the individual observations in the order in which they are weighed, measured, or counted.

(c) "Tare Sample Size" shall be as noted in "Procedure," 2933.3, Table I, Column "D" and shall be based on Column "B" "Package Sample Size."

(Note: When selecting a sample representing a "lot" or "sub-lot", the packages shall be selected at random if practicable. Packages shall be selected without regard to appearance. If practicable all samples shall be selected before weighing, measuring or testing is done. This provides for testing the "lot" or "sub-lot" in an "as found" condition.)

2931.7. *Retail Level.* "Retail Level" shall be construed to designate any place of business, or manner of selling any product, in which said product is, or may be, sold, offered or exposed for sale directly to the consumer or user.

(Note: When selecting a "sample" to be tested at the "retail level" said sample shall include

only those packages selected from a "lot" or "sub-lot" at a single point-of-sale location. This shall not preclude the taking of other "samples" from storage facilities, or other locations, within the retail outlet. However, any action to be taken by the inspector with respect to any "lot" or "sub-lot" shall be based on the "sample" of the specific "lot" or "sub-lot.")

2931.8. *Wholesale Level.* "Wholesale Level" shall be construed to include the packing, manufacturing, warehouse, storage, jobber and distribution levels.

(Note: In most cases at the above named levels, products will be found in case lots. The "sample" shall be based on the number of "packages" within the cases of the "lot" or "sub-lot.")

2931.9. *Unsuitable-for-sale.* "Unsuitable-for-sale" packages are packages that have been opened for testing purposes and cannot, in their opened state, be classed as saleable merchandise.

However, packages opened in the place of business where originally packaged are not to be construed as "unsuitable-for-sale" if, by following good sanitary procedures and adequately protecting the public health, the commodity within these packages may be reprocessed or repackaged. This shall be done at the expense of said packer.

2931.10. *Error.* "Error" means the amount the observed net contents of a package varies from the declared labeled contents.

Equipment and Use

2932. *Testing Equipment and Use.* The testing equipment used by weights and measures officials shall



be of such design, sensitivity, and construction so as to render accurate weight indications throughout its designated capacity. Said testing equipment should be fitted with locking devices to minimize wear to the working component while in transit, and should also be fitted with a handle for carrying and protective cover or box.

All testing equipment owned by a weights and measures jurisdiction shall be restricted to official use and completely controlled by said weights and measures jurisdiction.

Scales used by state or local officials for the package-checking procedure should be of such design and construction as to afford weight graduations appropriate to the quantity declarations on the packages to be checked.

2932.1. *Location of Package-checking Operations.* After the announcement of his presence, the official is to select a suitable position for his package-checking operations. The principal requirement of the site is its convenience—both to the inspector and to the place of business.

2932.2. *Placement, etc. of Testing Equipment.* The inspector shall see that the testing equipment used is placed upon a firm support immediately prior to its official use, is suitably leveled, and is tested for sensitiveness and accuracy at least through the weight range of the packages to be tested.

2932.2.1. *Use of Store Scale for Tests.* If a store scale is selected for use in the tests it shall be accurate and capable of being properly utilized for such tests. Once the scale has been selected by the inspector,

it shall not be released, except at his discretion, until the inspector's use of it has been completed.

*History:* 1. Amendment filed 9-23-71; effective thirtieth day thereafter (Register 71, No. 39).

2932.3. *Recordation of Errors.* Package "errors" (the amount of deviation from the stated net contents) shall be recorded only within the sensitivity of the scale at the applied load.

(Example: A scale graduated in 1/8 oz. graduations is found to be accurate and sensitive to 1/16 oz. Errors may be recorded to 1/16 oz. or any amount greater than 1/16 oz. A scale graduated in 1/8 oz. graduations is found to be accurate and sensitive to 1/8 oz. In no case shall errors be recorded to less than 1/8 oz. for that scale, but may be recorded in amounts greater than 1/8 oz.)

Procedure: Commodities Sold by Weight  
or Count in "Standard-Pack" or "Random-Pack"

#### Packages

2933. *Intent of Outline of Procedures.* It is the intent of the following step-by-step procedures to outline a uniform, feasible, and equitable method for determining acceptable or "off-sale" lots of packaged commodities based upon the average concept, and for determining which packages have unreasonable errors.

2933.1. *Lots.* The procedures for package testing as set forth herein shall be used only for single "lots," or "sub-lots." The results obtained from full samples of different "lots" or "sub-lots" shall not be numerically

averaged together or acted upon jointly. For purposes of passing or marking "off-sale," each lot or sublot tested shall be acted upon individually.

2933.2. *Off-Sale Order.* Pursuant to Division 5, Chapter 1, Section 12025.5 of the Business and Professions Code of the State of California, packages marked "off-sale" shall be suitably marked or identified with a tag or device. Said device or tag to be designed and furnished by the bureau. Such packages shall be subject to the provisions of Section 12025.5.

2933.3. *Payment for Packages.* Immediately after completion of tests upon a "lot" to be passed as correct the weights and measures official in charge of the test shall offer to pay for packages which he has, or caused to be, rendered "unsuitable for sale." Any such packages paid for with county funds shall be subject to such disposal as ordered by the governing board of supervisors. If, however, the "unsuitable for sale" packages are part of a lot marked off-sale then these packages are to be considered as part of the lot and the weights and measures officials need not pay for said packages. Packages opened in the place of business where originally packaged are not to be construed as "unsuitable for sale" if, by following good sanitary procedures and adequately protecting the public health, the commodity within these packages may be reprocessed or repackaged. This shall be done at the expense of the said packer. Pursuant to Division 5, Chapter 2, Article 2, Section 12211 of the Business and Professions Code, "the sealer may seize as evidence any package or container which is found to contain a lesser amount than represented."

Table I shall be used for Step 1 through Step 5 following:

Table I			
"A" Lot Size	"B" Package Sample Size	"C" Sub-Group Size	"D" Tare Sample Size
2	2	ALL	2
3	3	ALL	2
4	4	ALL	2
5	5	ALL	2
6	6	ALL	2
7	7	ALL	2
8	8	ALL	2
9	9	ALL	2
10	10	ALL	2
11-150	10	5	2
151-300	15	5	2
301-500	25	5	3
501-800	30	5	4
801-1300	40	5	5
1301-3200	50	5	6
3201-8000	60	5	7
8001-22,000	120	5	12
Over 22,000	240	5	23

2933.3.1. (Step 1.) *Number to Be Tested.* Determine the number of consumer size packages in the "lot" to be tested.

2933.3.2. (Step 2.) *Package Sample Size.* Determine the "PACKAGE SAMPLE SIZE" from Table I, Section 2933.3, column "B" "PACKAGE SAMPLE SIZE" corresponding to column "A" "LOT SIZE."

2933.3.3. (Step 3.) *Tare Sample Size.* Determine the "TARE SAMPLE SIZE" from Table I, Section 2933.3, column "D" "TARE SAMPLE SIZE" corresponding to column "B" "PACKAGE SAMPLE SIZE."

(Example: The "lot" being sampled consists of 32 cases of 24 consumer size packages in each case. "LOT SIZE" (column "A")=768 consumer size packages ( $32 \times 24 = 768$ ). A lot size of 768 packages falls in the range of 501-800



in column "A," and by reading to the right in column "B" a "PACKAGE SAMPLE SIZE" of 30 is determined. By reading to the right of 30 in column "B," a "TARE SAMPLE SIZE" of 4 is determined from column "D." These four packages are to be selected at random from the packages selected to represent the "PACKAGE SAMPLE SIZE.")

2933.3.4. (Step 4.) *Recording of Tare Sample.* Carefully weigh and record the gross weight of each package of the "Tare Sample" and identify each with a letter or numeral to be written on the package. (These containers should then be retained for use in Step 5.) Exercising care that none of the contents is spilled or lost, determine and record the net weight of the contents of each package. The net weight of the contents shall not include any free water or ice or ice glaze. When products are packaged in non-edible brine or other non-edible preserving fluids, the weight or measure of the non-edible brine or other non-edible fluid shall not be included in the weight or measure of the edible or other commodity indicated on the container.

2933.3.5. (Step 5.) *Tare Weight Determination.* Determine the average tare weight of the containers in the "Tare Sample" by dividing the total weight of the tare material by the number of containers. Individual container tare weights are classified as "Wet Tare" and "Dry Tare." When a single lot has some containers classed as "Wet Tares" and others as "Dry Tares," the weights of a representative number of "Wet Tares" and "Dry Tares" may be combined and averaged together.

(a) "Wet Tare" shall be determined by weighing the used, empty container from which all the usable net contents have been removed.

(b) "Dry Tare" shall be determined by weighing the empty and dry containers or by weighing unused containers of the same make, design, and type used at the time of packing. A "Dry Tare" is to be used only when none of the containers in the lot being sampled has retained a substance foreign to the container.

*History:* 1. Amendment of subsection (b) filed 9-23-71; effective thirtieth day thereafter (Register 71, No. 39).

2933.3.6. (Step 6.) *Recording of Errors.* Using the average tare weight determined in Step 5, each package in the PACKAGE SAMPLE shall be weighed and the errors recorded and, except for one hundred per cent sampling, shall be recorded in sub-groups of five (5). Regardless of the units in which the errors are recorded (tenths, sixteenths, eighths, quarters, or the like), these recordings are shown as whole numbers. The recording of results, either by one hundred per cent sampling or sub-groups, shall be as follows:

(a) The "zero errors" (recorded as 0) and the "plus errors" (recorded as whole numbers) are to be recorded in one column.

(b) The "minus errors" (recorded as whole numbers) are to be recorded in a second column.

2933.3.7. (Step 7.) *Established Tolerance.* If a tolerance has been established by the director for the commodity being tested, then any package the error of which exceeds, either plus or minus, the established tolerance shall be subject to appropriate action.

2933.3.8. (Step 8.) *Preliminary Total Error.* Determine the preliminary total error of the PACKAGE

SAMPLE. The preliminary total error, for those lots on which conclusions have not been reached under the foregoing procedure, shall be determined as illustrated by the following example:

(Note: In Example I below, the lot consisted of 200 packages giving "PACKAGE SAMPLE SIZE" of 15 and a "SUB-GROUP SIZE", from Table I, of 5, therefore three SUB-GROUPS shall be used in the computation.)

(a) As in the Example I below, add the plus (+) errors, on the one hand, and the minus (—) errors, on the other hand.

Example I

	Errors		Range
	—	+ & 0	
Sub-group No. 1.....	$\begin{Bmatrix} 1 \\ 3 \\ 1 \\ 1 \\ 3 \end{Bmatrix}$	$\begin{Bmatrix} - \\ - \\ - \\ - \\ - \end{Bmatrix}$	$\begin{Bmatrix} - \\ - \\ - \\ - \\ 2 \end{Bmatrix}$
Sub-group No. 2.....	$\begin{Bmatrix} 2 \\ 8 \end{Bmatrix}$	$\begin{Bmatrix} 1 \\ 2 \\ 1 \end{Bmatrix}$	$\begin{Bmatrix} - \\ - \\ 10 \end{Bmatrix}$
Sub-group No. 3.....	$\begin{Bmatrix} 2 \\ - \\ - \\ - \end{Bmatrix}$	$\begin{Bmatrix} 0 \\ 0 \\ 0 \\ 0 \end{Bmatrix}$	$\begin{Bmatrix} - \\ - \\ - \\ 2 \end{Bmatrix}$
Totals.....	-21	+4	14

Preliminary total error.....  $(-21) + (4) = -17$   
 Preliminary average error.....  $(-17 \div 15) = -1.13$   
 Preliminary average range.....  $(14 \div 3) = 4.66$

(b) Calculate the preliminary total error by algebraically adding the plus and minus errors. This is accomplished by arithmetically subtracting the smaller from the larger value and giving the remainder the sign of the larger value. (For example a plus four, (+4) added to a minus two (—2), equals a plus two (+2); or a plus four (+4), added to a minus nine (—9), equals a minus five (—5).)

2933.3.9. (Step 9.) *Range*. Calculate the range of each subgroup. The range is the total difference between the largest and smallest observation. (For example, the range between a minus 8 (—8) and a plus 2 (+2) is 10, or the range between a plus 2 (+2) and a plus 10 (+10) is 8.) Total the ranges of all the sub-groups in the sample. Divide this sum by the number of sub-groups in the sample. Record this result as the preliminary average range. (In Example I, Section 2933.3.8, we have  $14 \div 3 = 4.66$ .)

2933.3.10. (Step 10.) *Unreasonable Errors*. Determine the unreasonable error of individual packages by one of the following:

(a) If the preliminary average error is plus or zero, an individual unreasonable plus error is that package error which exceeds the sum of the preliminary average error and the numerical value shown in Table II; and an individual unreasonable minus error is one which exceeds the numerical value shown in Table II.

(b) If the preliminary average error is minus, an individual unreasonable minus error is that package error which exceeds the numerical value shown in Table II; and an individual unreasonable plus error



is that package error which exceeds the value of the remainder of the preliminary average error subtracted from the numerical value shown in Table II.

(Note: In Example I, using the range of 4.66 and the sub-group size of 5, the individual unreasonable minus error from Table II is any minus package error greater than 3.90; and the individual unreasonable plus error is any plus package error greater than 1.13 subtracted from 3.90 or 2.77.)

(c) Circle and exclude all individual unreasonable errors from further computations. Additional replacement packages shall be selected until those discarded as individual unreasonable errors have been replaced by ones suitable for final computation. Only packages having errors equal to or less than the unreasonable individual errors as originally determined in (a) and (b) of this section shall be suitable for final computations.

(d) If at any time during this part of the procedure the total number of packages having unreasonable minus errors, which are also unreasonable under the provisions of Division 5, Chapter 6, Section 12612 of the Business and Professions Code, and this number exceeds the number shown in Table I, Column D, for the corresponding sample size, then appropriate action shall be taken according to the provisions of Division 5, Chapter 2, Article 2, Section 12211 of the Business and Professions Code without further sampling.

If at any time during this part of the procedure the total number of packages having unreasonable plus errors exceeds the number shown in Table I, Column D, for the corresponding sample size then appropriate action shall be taken by calling this condition to the attention of the store operator or packer, or distributor.

Table II—Maximum Permissible Individual Error

Range*	SUB-GROUP SIZE								
	2	3	4	5	6	7	8	9	10
0.01- 0.19	.17	.12	.10	.08	.06	.07	.07	.07	.06
0.20- 0.39	.33	.25	.20	.15	.12	.12	.11	.10	.10
0.40- 0.59	.50	.38	.30	.23	.18	.18	.17	.16	.15
0.60- 0.79	.67	.51	.40	.31	.24	.24	.23	.22	.21
0.80- 0.99	.83	.64	.50	.39	.30	.30	.29	.28	.27
1.00- 1.19	1.00	.78	.60	.47	.36	.36	.35	.34	.33
1.20- 1.39	1.17	.92	.70	.55	.43	.43	.42	.41	.40
1.40- 1.59	1.33	1.04	.80	.63	.50	.50	.49	.48	.47
1.60- 1.79	1.50	1.17	.90	.71	.56	.56	.55	.54	.53
1.80- 1.99	1.67	1.30	.99	.79	.62	.62	.61	.60	.59
2.00- 2.19	1.83	1.42	1.10	.87	.68	.68	.67	.66	.65
2.20- 2.39	1.99	1.55	1.20	.95	.75	.75	.74	.73	.72
2.40- 2.59	2.17	1.67	1.30	1.03	.81	.81	.80	.79	.78
2.60- 2.79	2.33	1.80	1.40	1.13	.89	.89	.88	.87	.86
2.80- 2.99	2.50	1.94	1.50	1.20	.95	.95	.94	.93	.92
3.00- 3.19	2.67	2.08	1.60	1.29	.99	.99	.98	.97	.96
3.20- 3.39	2.83	2.22	1.70	1.37	1.03	1.03	1.02	1.01	1.00
3.40- 3.59	3.00	2.38	1.80	1.45	1.10	1.10	1.09	1.08	1.07
3.60- 3.79	3.17	2.53	1.90	1.53	1.16	1.16	1.15	1.14	1.13
3.80- 3.99	3.33	2.67	2.00	1.60	1.22	1.22	1.21	1.20	1.19
4.00- 4.19	3.50	2.82	2.10	1.67	1.28	1.28	1.27	1.26	1.25
4.20- 4.39	3.67	2.96	2.20	1.75	1.34	1.34	1.33	1.32	1.31
4.40- 4.59	3.83	3.10	2.30	1.83	1.40	1.40	1.39	1.38	1.37
4.60- 4.79	4.00	3.25	2.40	1.90	1.46	1.46	1.45	1.44	1.43
4.80- 4.99	4.17	3.39	2.50	1.97	1.52	1.52	1.51	1.50	1.49
5.00- 5.19	4.33	3.53	2.60	2.05	1.58	1.58	1.57	1.56	1.55
5.20- 5.39	4.50	3.68	2.70	2.13	1.64	1.64	1.63	1.62	1.61
5.40- 5.59	4.67	3.82	2.80	2.20	1.70	1.70	1.69	1.68	1.67
5.60- 5.79	4.83	3.96	2.90	2.28	1.76	1.76	1.75	1.74	1.73
5.80- 5.99	5.00	4.10	3.00	2.35	1.82	1.82	1.81	1.80	1.79
6.00- 6.19	5.17	4.25	3.10	2.43	1.88	1.88	1.87	1.86	1.85
6.20- 6.39	5.33	4.39	3.20	2.50	1.94	1.94	1.93	1.92	1.91
6.40- 6.59	5.50	4.53	3.30	2.58	2.00	2.00	1.99	1.98	1.97
6.60- 6.79	5.67	4.68	3.40	2.65	2.06	2.06	2.05	2.04	2.03
6.80- 6.99	5.83	4.82	3.50	2.73	2.12	2.12	2.11	2.10	2.09
7.00- 7.19	6.00	4.96	3.60	2.80	2.18	2.18	2.17	2.16	2.15
7.20- 7.39	6.17	5.10	3.70	2.88	2.24	2.24	2.23	2.22	2.21
7.40- 7.59	6.33	5.25	3.80	2.95	2.30	2.30	2.29	2.28	2.27
7.60- 7.79	6.50	5.39	3.90	3.03	2.36	2.36	2.35	2.34	2.33
7.80- 7.99	6.67	5.53	4.00	3.10	2.42	2.42	2.41	2.40	2.39
8.00- 8.19	6.83	5.68	4.10	3.18	2.48	2.48	2.47	2.46	2.45
8.20- 8.39	7.00	5.82	4.20	3.25	2.54	2.54	2.53	2.52	2.51
8.40- 8.59	7.17	5.96	4.30	3.33	2.60	2.60	2.59	2.58	2.57
8.60- 8.79	7.33	6.10	4.40	3.40	2.66	2.66	2.65	2.64	2.63
8.80- 8.99	7.50	6.25	4.50	3.48	2.72	2.72	2.71	2.70	2.69
9.00- 9.19	7.67	6.39	4.60	3.55	2.78	2.78	2.77	2.76	2.75
9.20- 9.39	7.83	6.53	4.70	3.63	2.84	2.84	2.83	2.82	2.81
9.40- 9.59	8.00	6.68	4.80	3.70	2.90	2.90	2.89	2.88	2.87
9.60- 9.79	8.17	6.82	4.90	3.78	2.96	2.96	2.95	2.94	2.93
9.80- 9.99	8.33	6.96	5.00	3.85	3.02	3.02	3.01	3.00	2.99
10.00-11.49	8.50	7.10	5.10	3.93	3.08	3.08	3.07	3.06	3.05
11.50-12.99	8.67	7.25	5.20	4.00	3.14	3.14	3.13	3.12	3.11
13.00-14.49	8.83	7.39	5.30	4.08	3.20	3.20	3.19	3.18	3.17
14.50-15.99	9.00	7.53	5.40	4.15	3.26	3.26	3.25	3.24	3.23
16.00-17.49	9.17	7.68	5.50	4.23	3.32	3.32	3.31	3.30	3.29
17.50-18.99	9.33	7.82	5.60	4.30	3.38	3.38	3.37	3.36	3.35
19.00-20.49	9.50	7.96	5.70	4.38	3.44	3.44	3.43	3.42	3.41
20.50-21.99	9.67	8.10	5.80	4.45	3.50	3.50	3.49	3.48	3.47
22.00-23.49	9.83	8.25	5.90	4.53	3.56	3.56	3.55	3.54	3.53
23.50-24.99	10.00	8.39	6.00	4.60	3.62	3.62	3.61	3.60	3.59
25.00-26.49	10.17	8.53	6.10	4.68	3.68	3.68	3.67	3.66	3.65
26.50-27.99	10.33	8.68	6.20	4.75	3.74	3.74	3.73	3.72	3.71
28.00-29.49	10.50	8.82	6.30	4.83	3.80	3.80	3.79	3.78	3.77
29.50-30.99	10.67	8.96	6.40	4.90	3.86	3.86	3.85	3.84	3.83
31.00-32.49	10.83	9.10	6.50	4.98	3.92	3.92	3.91	3.90	3.89
32.50-33.99	11.00	9.25	6.60	5.05	3.98	3.98	3.97	3.96	3.95
34.00-35.49	11.17	9.39	6.70	5.13	4.04	4.04	4.03	4.02	4.01
35.50-36.99	11.33	9.53	6.80	5.20	4.10	4.10	4.09	4.08	4.07
37.00-38.49	11.50	9.68	6.90	5.28	4.16	4.16	4.15	4.14	4.13
38.50-39.99	11.67	9.82	7.00	5.35	4.22	4.22	4.21	4.20	4.19
40.00-41.49	11.83	9.96	7.10	5.43	4.28	4.28	4.27	4.26	4.25
41.50-42.99	12.00	10.10	7.20	5.50	4.34	4.34	4.33	4.32	4.31
43.00-44.49	12.17	10.25	7.30	5.58	4.40	4.40	4.39	4.38	4.37
44.50-45.99	12.33	10.39	7.40	5.65	4.46	4.46	4.45	4.44	4.43
46.00-47.49	12.50	10.53	7.50	5.73	4.52	4.52	4.51	4.50	4.49
47.50-48.99	12.67	10.68	7.60	5.80	4.58	4.58	4.57	4.56	4.55
49.00-50.49	12.83	10.82	7.70	5.88	4.64	4.64	4.63	4.62	4.61
50.50-51.99	13.00	10.96	7.80	5.95	4.70	4.70	4.69	4.68	4.67
52.00-53.49	13.17	11.10	7.90	6.03	4.76	4.76	4.75	4.74	4.73
53.50-54.99	13.33	11.25	8.00	6.10	4.82	4.82	4.81	4.80	4.79
55.00-56.49	13.50	11.39	8.10	6.18	4.88	4.88	4.87	4.86	4.85
56.50-57.99	13.67	11.53	8.20	6.25	4.94	4.94	4.93	4.92	4.91
58.00-59.49	13.83	11.68	8.30	6.33	5.00	5.00	4.99	4.98	4.97
59.50-60.99	14.00	11.82	8.40	6.40	5.06	5.06	5.05	5.04	5.03
61.00-62.49	14.17	11.96	8.50	6.48	5.12	5.12	5.11	5.10	5.09
62.50-63.99	14.33	12.10	8.60	6.55	5.18	5.18	5.17	5.16	5.15
64.00-65.49	14.50	12.25	8.70	6.63	5.24	5.24	5.23	5.22	5.21
65.50-66.99	14.67	12.39	8.80	6.70	5.30	5.30	5.29	5.28	5.27
67.00-68.49	14.83	12.53	8.90	6.78	5.36	5.36	5.35	5.34	5.33
68.50-69.99	15.00	12.68	9.00	6.85	5.42	5.42	5.41	5.40	5.39
70.00-71.49	15.17	12.82	9.10	6.93	5.48	5.48	5.47	5.46	5.45
71.50-72.99	15.33	12.96	9.20	7.00	5.54	5.54	5.53	5.52	5.51
73.00-74.49	15.50	13.10	9.30	7.08	5.60	5.60	5.59	5.58	5.57
74.50-75.99	15.67	13.25	9.40	7.15	5.66	5.66	5.65	5.64	5.63
76.00-77.49	15.83	13.39	9.50	7.23	5.72	5.72	5.71	5.70	5.69
77.50-78.99	16.00	13.53	9.60	7.30	5.78	5.78	5.77	5.76	5.75
79.00-80.49	16.17	13.68	9.70	7.38	5.84	5.84	5.83	5.82	5.81
80.50-81.99	16.33	13.82	9.80	7.45	5.90	5.90	5.89	5.88	5.87
82.00-83.49	16.50	13.96	9.90	7.53	5.96	5.96	5.95	5.94	5.93
83.50-84.99	16.67	14.10	10.00	7.60	6.02	6.02	6.01	6.00	5.99
85.00-86.49	16.83	14.25	10.10	7.68	6.08	6.08	6.07	6.06	6.05
86.50-87.99	17.00	14.39	10.20	7.75	6.14	6.14	6.13	6.12	6.11
88.00-89.49	17.17	14.53	10.30	7.83	6.20	6.20	6.19	6.18	6.17
89.50-90.99	17.33	14.68	10.40	7.90	6.26	6.26	6.25	6.24	6.23
91.00-92.49	17.50	14.82	10.50	7.98	6.32	6.32	6.31	6.30	6.29
92.50-93.99	17.67	14.96	10.60	8.05	6.38	6.38	6.37	6.36	6.35
94.00-95.49	17.83	15.10	10.70	8.13	6.44	6.44	6.43	6.42	6.41
95.50-96.99	18.00	15.25	10.80	8.20	6.50	6.50	6.49	6.48	6.47
97.00-98.49	18.17	15.39	10.90	8.28	6.56	6.56	6.55	6.54	6.53
98.50-99.99	18.33	15.53	11.00	8.35	6.62	6.62	6.61	6.60	6.59
100.00-101.49	18.50	15.68	11.10	8.43	6.68	6.68	6.67	6.66	6.65
101.50-102.99	18.67	15.82	11.20	8.50	6.74	6.74	6.73	6.72	6.71
103.00-104.49	18.83	15.96	11.30						

Table II—Maximum Permissible Individual Error—Continued

Range*	SUB-GROUP SIZE								
	2	3	4	5	6	7	8	9	10
41.....	71.21	47.48	39.03	34.55	31.71	29.72	28.22	27.05	26.11
42.....	72.95	48.63	39.98	35.39	32.48	30.44	28.91	27.73	26.75
43.....	74.69	49.79	40.93	36.23	33.26	31.17	29.60	28.38	27.38
44.....	76.43	50.95	41.89	37.07	34.03	31.89	30.29	29.04	28.02
45.....	78.16	52.11	42.84	37.92	34.80	32.62	30.98	29.70	28.66
46.....	79.90	53.27	43.79	38.76	35.58	33.34	31.66	30.36	29.29
47.....	81.64	54.42	44.74	39.60	36.35	34.07	32.35	31.02	29.93
48.....	83.37	55.58	45.69	40.44	37.12	34.79	33.04	31.68	30.57
49.....	85.11	56.74	46.65	41.29	37.90	35.52	33.73	32.34	31.20
50.....	86.85	57.90	47.60	42.13	38.67	36.24	34.42	33.00	31.84

\* Range for coded values in tenths, one-sixteenth ounce, one-eighth ounce, or other values.

- History:* 1. Correctory amendment filed 1-26-61 as an emergency; designated effective 1-29-61. Certificate of compliance included (Register 61, No. 2).  
2. Amendment of subsection (d) filed 8-25-70; effective thirtieth day thereafter (Register 70, No. 35).

**2933.3.11. (Step 11.) Total Error.** Recalculate a new total error and a new average error by the procedure outlined in Step 8 and Step 9. (See Example II).

(Note: In Example II, the minus 3 error is circled and discarded. The replacement package has a minus 3 error.)

Example II

	Errors		Range
		+ & 0	
Sub-Group No. 1.....	1 3 1 1 3	.. .. .. .. ..	.. .. .. .. 2
Sub-Group No. 2.....	2 3 ⑧ ..	1 2 1	.. .. -4- 5
Sub-Group No. 3.....	2 .. .. ..	0 0 0 0	.. .. .. 2
Totals.....	-8+	++	++
Corrected Totals.....	-16	+4	9

Corrected total error.....(-16) + (4) = -12

Corrected average range.....(9 + 3) = 3.00



The individual unreasonable errors, both plus and minus, are excluded from the average, because they are acted upon individually and because their inclusion could destroy or alter the packaging pattern. For instance: A sample of ten (10) packages could show nine (9) packages each with a minus error of 1, and one package with a plus error of 9. If the large plus error is included, the total error is 0. Obviously, the pattern of the sample is a minus 1 per package.

2933.3.12. (Step 12.) *Preliminary Determination.*

(a) If the total error as obtained from the sample is plus and is less than the value shown in Table III for the corresponding range and sample size, then a shortage may or may not exist, and additional samples may or may not be taken, depending upon the discretion of the weights and measures official. If no additional samples are taken the lot shall be passed. If additional samples are taken then the procedures as set forth in the following sections shall govern the disposition of the lot.

(b) If the total error obtained from the sample is less than the above-determined value, and the error is minus, then a shortage may or may not exist, and additional samples may or may not be taken, depending upon the discretion of the weights and measures official. If no additional samples are taken the lot shall be passed. If additional samples are taken then the procedures as set forth in the following sections shall govern the disposition of the lot.

Table III—Value to Be Used to Indicate a Possible Shortage \*\*

Range*	SAMPLE SIZE								
	10	15	25	30	40	50	60	120	240
0.01-0.19	.22	.27	.35	.39	.45	.50	.55	.77	1.10
0.20-0.39	.67	.82	1.06	1.16	1.34	1.50	1.64	2.32	3.29
0.40-0.59	1.12	1.37	1.77	1.94	2.24	2.50	2.74	3.87	5.48
0.60-0.79	1.57	1.92	2.48	2.71	3.13	3.50	3.83	5.42	7.67
0.80-0.99	2.01	2.47	3.18	3.49	4.03	4.50	4.93	6.97	9.86
1.00-1.24	2.52	3.08	3.98	4.36	5.03	5.63	6.16	8.72	12.33
1.25-1.49	3.07	3.77	4.86	5.33	6.15	6.88	7.53	10.65	15.06
1.50-1.74	3.63	4.45	5.75	6.29	7.27	8.13	8.90	12.59	17.80
1.75-1.99	4.19	5.14	6.63	7.26	8.39	9.38	10.27	14.53	20.54
2.00-2.24	4.75	5.82	7.61	8.23	9.50	10.63	11.64	16.46	23.28
2.25-2.49	5.31	6.50	8.40	9.20	10.62	11.88	13.01	18.40	26.02
2.50-2.74	5.87	7.19	9.28	10.17	11.74	13.13	14.38	20.34	28.76
2.75-2.99	6.43	7.87	10.17	11.14	12.86	14.38	15.75	22.27	31.50
3.00-3.24	6.99	8.56	11.05	12.10	13.98	15.63	17.12	24.21	34.24
3.25-3.49	7.55	9.24	11.93	13.07	15.10	16.88	18.49	26.15	36.98
3.50-3.74	8.11	9.93	12.82	14.04	16.21	18.13	19.86	28.08	39.71
3.75-3.99	8.67	10.61	13.70	15.01	17.33	19.38	21.23	30.02	42.45
4.00-4.24	9.23	11.30	14.59	15.98	18.45	20.63	22.60	31.96	45.19
4.25-4.49	9.78	11.98	15.47	16.95	19.57	21.88	23.97	33.89	47.93
4.50-4.74	10.34	12.67	16.35	17.91	20.69	23.13	25.33	35.83	50.67
4.75-4.99	10.90	13.35	17.24	18.88	21.80	24.38	26.70	37.77	53.41
5.00-5.24	11.46	14.04	18.12	19.85	22.92	25.63	28.07	39.70	56.15
5.25-5.49	12.02	14.72	19.01	20.82	24.04	26.88	29.44	41.64	58.89
5.50-5.74	12.58	15.41	19.89	21.79	25.16	28.13	30.81	43.58	61.63
5.75-5.99	13.14	16.09	20.77	22.76	26.28	29.38	32.18	45.51	64.36
6.00-6.24	13.69	16.77	21.65	23.73	27.40	30.63	33.55	47.45	67.10
6.25-6.49	14.25	17.45	22.53	24.70	28.52	31.88	34.92	49.39	69.84
6.50-6.74	14.81	18.13	23.41	25.67	29.64	33.13	36.29	51.33	72.58
6.75-6.99	15.37	18.81	24.29	26.64	30.76	34.38	37.66	53.27	75.32
7.00-7.24	15.93	19.49	25.17	27.61	31.88	35.63	39.03	55.21	78.06
7.25-7.49	16.49	20.17	26.05	28.58	33.00	36.88	40.40	57.15	80.80
7.50-7.74	17.05	20.85	26.93	29.55	34.12	38.13	41.77	59.09	83.54
7.75-7.99	17.61	21.53	27.81	30.52	35.24	39.38	43.14	61.03	86.28
8.00-8.24	18.17	22.21	28.69	31.49	36.36	40.63	44.51	62.97	89.02
8.25-8.49	18.73	22.89	29.57	32.46	37.48	41.88	45.88	64.91	91.76
8.50-8.74	19.29	23.57	30.45	33.43	38.60	43.13	47.25	66.85	94.50
8.75-8.99	19.85	24.25	31.33	34.40	39.72	44.38	48.62	68.79	97.24
9.00-9.24	20.41	24.93	32.21	35.37	40.84	45.63	50.00	70.73	100.00
9.25-9.49	20.97	25.61	33.09	36.34	41.96	46.88	51.37	72.67	102.74
9.50-9.74	21.53	26.29	33.97	37.31	43.08	48.13	52.74	74.61	105.48
9.75-9.99	22.09	26.97	34.85	38.28	44.20	49.38	54.11	76.55	108.22
10.00-10.24	22.65	27.65	35.73	39.25	45.32	50.63	55.48	78.49	110.96
10.25-10.49	23.21	28.33	36.61	40.22	46.44	51.88	56.85	80.43	113.70
10.50-10.74	23.77	29.01	37.49	41.19	47.56	53.13	58.22	82.37	116.44
10.75-10.99	24.33	29.69	38.37	42.16	48.68	54.38	59.59	84.31	119.18
11.00-11.24	24.89	30.37	39.25	43.13	49.80	55.63	60.96	86.25	121.92
11.25-11.49	25.45	31.05	40.13	44.10	50.92	56.88	62.33	88.19	124.66
11.50-11.74	26.01	31.73	41.01	45.07	52.04	58.13	63.70	90.13	127.40
11.75-11.99	26.57	32.41	41.89	46.04	53.16	59.38	65.07	92.07	130.14
12.00-12.24	27.13	33.09	42.77	47.01	54.28	60.63	66.44	94.01	132.88
12.25-12.49	27.69	33.77	43.65	47.98	55.40	61.88	67.81	95.95	135.62
12.50-12.74	28.25	34.45	44.53	48.95	56.52	63.13	69.18	97.89	138.36
12.75-12.99	28.81	35.13	45.41	49.92	57.64	64.38	70.55	99.83	141.10
13.00-13.24	29.37	35.81	46.29	50.89	58.76	65.63	71.92	101.77	143.84
13.25-13.49	29.93	36.49	47.17	51.86	59.88	66.88	73.29	103.71	146.58
13.50-13.74	30.49	37.17	48.05	52.83	60.92	68.13	74.66	105.65	149.32
13.75-13.99	31.05	37.85	48.93	53.80	62.04	69.38	76.03	107.59	152.06
14.00-14.24	31.61	38.53	49.81	54.77	63.16	70.63	77.40	109.53	154.80
14.25-14.49	32.17	39.21	50.69	55.74	64.28	71.88	78.77	111.47	157.54
14.50-14.74	32.73	39.89	51.57	56.71	65.40	73.13	80.14	113.41	160.28
14.75-14.99	33.29	40.57	52.45	57.68	66.52	74.38	81.51	115.35	163.02
15.00-15.24	33.85	41.25	53.33	58.65	67.64	75.63	82.88	117.29	165.76
15.25-15.49	34.41	41.93	54.21	59.62	68.76	76.88	84.25	119.23	168.50
15.50-15.74	34.97	42.61	55.09	60.59	69.88	78.13	85.62	121.17	171.24
15.75-15.99	35.53	43.29	55.97	61.56	71.00	79.38	86.99	123.11	173.98
16.00-16.24	36.09	43.97	56.85	62.53	72.12	80.63	88.36	125.05	176.72
16.25-16.49	36.65	44.65	57.73	63.50	73.24	81.88	89.73	126.99	179.46
16.50-16.74	37.21	45.33	58.61	64.47	74.36	83.13	91.10	128.93	182.20
16.75-16.99	37.77	46.01	59.49	65.44	75.48	84.38	92.47	130.87	184.94
17.00-17.24	38.33	46.69	60.37	66.41	76.60	85.63	93.84	132.81	187.68
17.25-17.49	38.89	47.37	61.25	67.38	77.72	86.88	95.21	134.75	190.42
17.50-17.74	39.45	48.05	62.13	68.35	78.84	88.13	96.58	136.69	193.16
17.75-17.99	40.01	48.73	63.01	69.32	79.96	89.38	97.95	138.63	195.90
18.00-18.24	40.57	49.41	63.89	70.29	81.08	90.63	99.32	140.57	198.64
18.25-18.49	41.13	50.09	64.77	71.26	82.20	91.88	100.69	142.51	201.38
18.50-18.74	41.69	50.77	65.65	72.23	83.32	93.13	102.06	144.45	204.12
18.75-18.99	42.25	51.45	66.53	73.20	84.44	94.38	103.43	146.39	206.86
19.00-19.24	42.81	52.13	67.41	74.17	85.56	95.63	104.80	148.33	209.60
19.25-19.49	43.37	52.81	68.29	75.14	86.68	96.88	106.17	150.27	212.34
19.50-19.74	43.93	53.49	69.17	76.11	87.80	98.13	107.54	152.21	215.08
19.75-19.99	44.49	54.17	70.05	77.08	88.92	99.38	108.91	154.15	217.82
20.00-20.24	45.05	54.85	70.93	78.05	90.04	100.63	110.28	156.09	220.56
20.25-20.49	45.61	55.53	71.81	79.02	91.16	101.88	111.65	158.03	223.30
20.50-20.74	46.17	56.21	72.69	80.00	92.28	103.13	113.02	160.00	226.04
20.75-20.99	46.73	56.89	73.57	80.97	93.40	104.38	114.39	161.94	228.78
21.00-21.24	47.29	57.57	74.45	81.94	94.52	105.63	115.76	163.88	231.52
21.25-21.49	47.85	58.25	75.33	82.91	95.64	106.88	117.13	165.82	234.26
21.50-21.74	48.41	58.93	76.21	83.88	96.76	108.13	118.50	167.76	237.00
21.75-21.99	48.97	59.61	77.09	84.85	97.88	109.38	119.87	169.70	239.74
22.00-22.24	49.53	60.29	77.97	85.82	99.00	110.63	121.24	171.64	242.48
22.25-22.49	50.09	60.97	78.85	86.79	100.12	111.88	122.61	173.58	245.22
22.50-22.74	50.65	61.65	79.73	87.76	101.24	113.13	123.98	175.52	247.96
22.75-22.99	51.21	62.33	80.61	88.73	102.36	114.38	125.35	177.46	250.70
23.00-23.24	51.77	63.01	81.49	89.70	103.48	115.63	126.72	179.40	253.44
23.25-23.49	52.33	63.69	82.37	90.67	104.60	116.88	128.09	181.34	256.18
23.50-23.74	52.89	64.37	83.25	91.64	105.72	118.13	129.46	183.28	258.92
23.75-23.99	53.45	65.05	84.13	92.61	106.84	119.38	130.83	185.22	261.66
24.00-24.24	54.01	65.73	85.01	93.58	107.96	120.63	132.20	187.16	264.40
24.25-24.49	54.57	66.41	85.89	94.55	109.08	121.88	133.57	189.10	267.14
24.50-24.74	55.13	67.09	86.77	95.52	110.20	123.13	134.94	191.04	269.88
24.75-24.99	55.69	67.77	87.65	96.49	111.32	124.38	136.31	192.98	272.62
25.00-25.24	56.25	68.45	88.53	97.46	112.44	125.63	137.68	194.92	275.36
25.25-25.49	56.81	69.13	89.41	98.43	113.56	126.88	139.05	196.86	278.10
25.50-25.74	57.37	69.81	90.29	99.40	114.68	128.13	140.42	198.80	280.84
25.75-25.99	57.93	70.49	91.17	100.37	115.80	129.38	141.79	200.74	283.58
26.00-26.24	58.49	71.17	92.05	101.34	116.92	130.63	143.16	202.68	286.32
26.25-26.49	59.05	71.85	92.93	102.31	118.04	131.88	144.53	204.62	289.06
26.50-26.74	59.61	72.53	93.81	103.28	119.16	133.13	145.90	206.56	291.80
26.75-26.99	60.17	73.21	94.69	104.25	120.28	134.38	147.27	208.50	294.54
27.00-27.2									



Table III—Value to Be Used to Indicate a Possible Shortage \*\*—Continued

Range*	SAMPLE SIZE								
	10	15	25	30	40	50	60	120	240
41.....	91.69	112.30	144.97	158.81	183.38	205.02	224.59	317.62	449.18
42.....	93.93	115.03	148.51	162.68	187.85	210.02	230.07	325.37	460.14
43.....	96.16	117.77	152.04	166.56	192.32	215.02	235.55	333.11	471.09
44.....	98.40	120.51	155.58	170.43	196.80	220.02	241.03	340.86	482.05
45.....	100.63	123.25	159.12	174.30	201.27	225.03	246.50	348.61	493.01
46.....	102.87	125.99	162.65	178.18	205.74	230.03	251.98	356.35	503.96
47.....	105.11	128.73	166.19	182.05	210.21	235.03	257.46	364.10	514.92
48.....	107.34	131.47	169.72	185.92	214.69	240.03	262.94	371.85	525.87
49.....	109.58	134.21	173.26	189.80	219.16	245.03	268.41	379.59	536.83
50.....	111.82	136.95	176.80	193.67	223.63	250.03	273.89	387.34	547.78

\* Range for coded values in tenths, one-sixteenth ounce, one-eighth ounce, or other values.

\*\* Based on sub-sample sizes of 5.

Table IV—Correction Factors

Percent of lot sampled	Correction factor	Percent of lot sampled	Correction factor	Percent of lot sampled	Correction factor
1.....	.99	34.....	.81	68.....	.57
2.....	.99	35.....	.81	69.....	.56
3.....	.98	36.....	.80	70.....	.55
4.....	.98	37.....	.79	71.....	.54
5.....	.97	38.....	.79	72.....	.53
6.....	.97	39.....	.78	73.....	.52
7.....	.96	40.....	.77	74.....	.51
8.....	.96	41.....	.77	75.....	.50
9.....	.95	42.....	.76	76.....	.49
10.....	.95	43.....	.75	77.....	.48
11.....	.94	44.....	.75	78.....	.47
12.....	.94	45.....	.74	79.....	.46
13.....	.93	46.....	.73	80.....	.45
14.....	.93	47.....	.73	81.....	.44
15.....	.92	48.....	.72	82.....	.42
16.....	.92	49.....	.71	83.....	.41
17.....	.91	50.....	.71	84.....	.40
18.....	.91	51.....	.70	85.....	.39
19.....	.90	52.....	.69	86.....	.37
20.....	.89	53.....	.69	87.....	.36
21.....	.89	54.....	.68	88.....	.35
22.....	.88	55.....	.67	89.....	.33
23.....	.88	56.....	.66	90.....	.32
24.....	.87	57.....	.66	91.....	.30
25.....	.87	58.....	.65	92.....	.28
26.....	.86	59.....	.64	93.....	.28
27.....	.85	60.....	.63	94.....	.24
28.....	.85	61.....	.63	95.....	.22
29.....	.84	62.....	.62	96.....	.20
30.....	.84	63.....	.61	97.....	.17
31.....	.83	64.....	.60	98.....	.14
32.....	.83	65.....	.59	99.....	.10
33.....	.82	66.....	.58	100.....	0
		67.....	.57		

Table V—Maximum Permissible Total Error \*\*

Range*	SAMPLE SIZE								
	10	15	25	30	40	50	60	120	240
0.01-0.19.....	.42	.52	.67	.73	.84	.94	1.03	1.46	2.06
0.20-0.39.....	1.26	1.55	2.00	2.19	2.53	2.83	3.10	4.38	6.19
0.40-0.59.....	2.11	2.58	3.33	3.65	4.21	4.71	5.16	7.30	10.32
0.60-0.79.....	2.95	3.61	4.66	5.11	5.90	6.60	7.23	10.22	14.45
0.80-0.99.....	3.79	4.65	6.00	6.57	7.59	8.48	9.29	13.14	18.58
1.00-1.24.....	4.74	5.81	7.50	8.21	9.48	10.60	11.61	16.42	23.23
1.25-1.49.....	5.79	7.10	9.16	10.04	11.59	12.96	14.19	20.07	28.39
1.50-1.74.....	6.85	8.39	10.83	11.86	13.70	15.31	16.77	23.72	33.55
1.75-1.99.....	7.90	9.68	12.49	13.69	15.80	17.67	19.36	27.37	38.71
2.00-2.24.....	8.96	10.97	14.16	15.51	17.91	20.03	21.94	31.02	43.87
2.25-2.49.....	10.01	12.26	15.83	17.34	20.02	22.38	24.52	34.67	49.03
2.50-2.74.....	11.06	13.55	17.49	19.16	22.13	24.74	27.10	38.32	54.20
2.75-2.99.....	12.12	14.84	19.16	20.99	24.23	27.09	29.68	41.97	59.36
3.00-3.24.....	13.17	16.13	20.82	22.81	26.34	29.45	32.26	45.62	64.52
3.25-3.49.....	14.22	17.42	22.49	24.64	28.45	31.80	34.84	49.27	69.68
3.50-3.74.....	15.28	18.71	24.16	26.46	30.55	34.16	37.42	52.92	74.84
3.75-3.99.....	16.33	20.00	25.82	28.29	32.66	36.52	40.00	56.57	80.00
4.00-4.24.....	17.38	21.29	27.49	30.11	34.77	38.87	42.58	60.22	86.16
4.25-4.49.....	18.44	22.58	29.15	31.94	36.88	41.23	45.16	63.87	90.33
4.50-4.74.....	19.49	23.87	30.82	33.76	38.98	43.58	47.74	67.52	95.49
4.75-4.99.....	20.54	25.16	32.48	35.58	41.09	45.94	50.32	71.17	100.65
5.00-5.24.....	21.60	26.45	34.15	37.41	43.20	48.30	52.91	74.82	105.81
5.25-5.49.....	22.65	27.74	35.82	39.23	45.30	50.65	55.49	78.47	110.97
5.50-5.74.....	23.71	29.03	37.48	41.06	47.41	53.01	58.07	82.12	116.13
5.75-5.99.....	24.76	30.32	39.15	42.88	49.52	55.36	60.65	85.77	121.29
6.00-6.24.....	25.84	32.26	41.65	45.62	52.68	58.90	64.52	91.24	129.04
6.25-6.49.....	26.85	34.84	44.98	49.27	56.89	63.61	69.58	98.54	139.36
6.50-6.74.....	28.45	37.42	48.31	52.92	61.11	68.32	74.84	105.84	149.68
6.75-6.99.....	30.55	40.00	51.64	56.57	65.32	73.03	80.00	113.14	160.01
7.00-7.24.....	32.66	42.58	54.97	60.22	69.54	77.74	85.16	120.44	170.33
7.25-7.49.....	34.77	45.16	58.31	63.87	73.75	82.46	90.33	127.74	180.65
7.50-7.74.....	36.88	47.74	61.64	67.52	77.97	87.17	95.49	135.04	190.97
7.75-7.99.....	38.98	50.32	64.98	71.17	82.12	92.41	100.65	142.34	201.29
8.00-8.24.....	41.09	52.91	68.32	74.82	85.77	95.49	105.81	149.68	211.61
8.25-8.49.....	43.20	55.49	71.17	78.47	89.03	98.54	108.97	156.97	221.93
8.50-8.74.....	45.30	58.07	74.82	82.12	92.41	101.29	111.61	164.29	232.25
8.75-8.99.....	47.41	60.65	78.47	85.77	95.49	104.65	114.97	171.61	242.57
9.00-9.24.....	49.52	63.87	82.12	89.03	98.54	108.01	118.29	178.93	252.89
9.25-9.49.....	51.64	66.97	85.77	92.41	101.29	111.61	121.61	186.25	263.21
9.50-9.74.....	53.76	69.58	89.03	95.49	104.65	114.97	124.93	193.57	273.53
9.75-9.99.....	55.88	72.16	92.41	98.54	108.01	118.29	128.25	200.89	283.85
10.00-10.24.....	58.00	74.82	95.49	101.29	111.61	121.61	131.57	208.21	294.17
10.25-10.49.....	60.12	77.44	98.54	104.65	114.97	124.93	134.89	215.53	304.49
10.50-10.74.....	62.24	80.06	101.29	108.01	118.29	128.25	138.21	222.85	314.81
10.75-10.99.....	64.36	82.68	104.65	111.61	121.61	131.57	141.53	230.17	325.13
11.00-11.24.....	66.48	85.30	108.01	114.97	124.93	134.89	144.85	237.49	335.45
11.25-11.49.....	68.60	87.92	111.61	118.29	128.25	138.21	148.17	244.81	345.77
11.50-11.74.....	70.72	90.54	114.97	121.61	131.57	141.53	151.49	252.13	356.09
11.75-11.99.....	72.84	93.16	118.29	124.93	134.89	144.85	154.81	259.45	366.41
12.00-12.24.....	74.96	95.78	121.61	128.25	138.21	148.17	158.13	266.77	376.73
12.25-12.49.....	77.08	98.40	124.93	131.57	141.53	151.49	161.45	274.09	387.05
12.50-12.74.....	79.20	101.02	128.25	134.89	144.85	154.81	164.77	281.41	397.37
12.75-12.99.....	81.32	103.64	131.57	138.21	148.17	158.13	168.09	288.73	407.69
13.00-13.24.....	83.44	106.26	134.89	141.53	151.49	161.45	171.41	296.05	418.01
13.25-13.49.....	85.56	108.88	138.21	144.85	154.81	164.77	174.73	303.37	428.33
13.50-13.74.....	87.68	111.50	141.53	148.17	158.13	168.09	178.05	310.69	438.65
13.75-13.99.....	89.80	114.12	144.85	151.49	161.45	171.41	181.37	318.01	448.97
14.00-14.24.....	91.92	116.74	148.17	154.81	164.77	174.73	184.69	325.33	459.29
14.25-14.49.....	94.04	119.36	151.49	158.13	168.09	178.05	188.01	332.65	469.61
14.50-14.74.....	96.16	121.98	154.81	161.45	171.41	181.37	191.33	340.00	479.93
14.75-14.99.....	98.28	124.60	158.13	164.77	174.73	184.69	194.65	347.32	490.25
15.00-15.24.....	100.40	127.22	161.45	168.09	178.05	188.01	197.97	354.64	500.57
15.25-15.49.....	102.52	129.84	164.77	171.41	181.37	191.33	201.29	361.96	510.89
15.50-15.74.....	104.64	132.46	168.09	174.73	184.69	194.65	204.61	369.28	521.21
15.75-15.99.....	106.76	135.08	171.41	178.05	188.01	197.97	207.93	376.60	531.53
16.00-16.24.....	108.88	137.70	174.73	181.37	191.33	201.29	211.25	383.92	541.85
16.25-16.49.....	111.00	140.32	178.05	184.69	194.65	204.61	214.57	391.24	552.17
16.50-16.74.....	113.12	142.94	181.37	188.01	197.97	207.93	217.89	398.56	562.49
16.75-16.99.....	115.24	145.56	184.69	191.33	201.29	211.25	221.21	405.88	572.81
17.00-17.24.....	117.36	148.18	188.01	194.65	204.61	214.57	224.53	413.20	583.13
17.25-17.49.....	119.48	150.80	191.33	197.97	207.93	217.89	227.85	420.52	593.45
17.50-17.74.....	121.60	153.42	194.65	201.29	211.25	221.21	231.17	427.84	603.77
17.75-17.99.....	123.72	156.04	197.97	204.61	214.57	224.53	234.49	435.16	614.09
18.00-18.24.....	125.84	158.66	201.29	207.93	217.89	227.85	237.81	442.48	624.41
18.25-18.49.....	127.96	161.28	204.61	211.25	221.21	231.17	241.13	449.80	634.73
18.50-18.74.....	130.08	163.90	207.93	214.57	224.53	234.49	244.45	457.12	645.05
18.75-18.99.....	132.20	166.52	211.25	217.89	227.85	237.81	247.77	464.44	655.37
19.00-19.24.....	134.32	169.14	214.57	221.21	231.17	241.13	251.09	471.76	665.69
19.25-19.49.....	136.44	171.76	217.89	224.53	234.49	244.45	254.41	479.08	676.01
19.50-19.74.....	138.56	174.38	221.21	227.85	237.81	247.77	257.73	486.40	686.33
19.75-19.99.....	140.68	177.00	224.53	231.17	241.13	251.09	261.05	493.72	696.65
20.00-20.24.....	142.80	179.62	227.85	234.49	244.45	254.41	264.37	501.04	706.97
20.25-20.49.....	144.92	182.24	231.17	237.81	247.77	257.73	267.69	508.36	717.29
20.50-20.74.....	147.04	184.86	234.49	241.13	251.09	261.05	271.01	515.68	727.61
20.75-20.99.....	149.16	187.48	237.81	244.45	254.41	264.37	274.33	523.00	737.93
21.00-21.24.....	151.28	190.10	241.13	247.77	257.73	267.69	277.65	530.32	748.25
21.25-21.49.....	153.40	192.72	244.45	251.09	261.05	271.01	280.97	537.64	758.57
21.50-21.74.....	155.52	195.34	247.77	254.41	264.37	274.33	284.29	544.96	768.89
21.75-21.99.....	157.64	197.96	251.09	257.73	267.69	277.65	287.61	552.28	779.21
22.00-22.24.....	159.76	200.58	254.41	261.05	271.01	280.97	290.93	559.60	789.53
22.25-22.49.....	161.88	203.20	257.73	264.37	274.33	284.29	294.25	566.92	799.85
22.50-22.74.....	164.00	205.82	261.05	267.69	277.65	287.61	297.57	574.24	810.17
22.75-22.99.....	166.12	208.44	264.37	271.01	280.97	290.93	300.89	581.56	820.49
23.00-23.24.....	168.24	211.06	267.69	274.33	284.29	294.25	304.21	588.88	830.81
23.25-23.49.....	170.36	213.68	271.01	277.65	287.61	297.57	307.53	596.20	841.13
23.50-23.74.....	172.48	216.30	274.33	280.97	290.93	300.89	310.85	603.52	851.45
23.75-23.99.....	174.60	218.92	277.65	284.29	294.25	304.21	314.17	610.84	861.77
24.00-24.24.....	176.72	221.54	280.97	287.61	297.57	307.53	317.49	618.16	872.09
24.25-24.49.....	178.84	224.16	284.29	290.93	300.89	310.85	320.81	625.48	882.41
24.50-24.74.....	180.96	226.78	287.61	294.25	304.21	314.17	324.13	632.80	892.73
24.75-24.99.....	183.08	229.40	290.93	297.57	307.53	317.49	327.45	640.12	903.05
25.00-25.24.....	185.20	232.02	294.25	300.89	310.85	320.81	330.77	647.44	913.37
25.25-25.49.....	187.32	234.64	297.57	304.21	314.17	324.13	334.09	654.76	923.69
25.50-25.74.....	189.44	237.26	300.89	307.53	317.49	327.45	337.41	662.08	934.01
25.75-25.99.....	191.56	239.88	304.						



**Table V—Maximum Permissible Total Error \*\*—Continued**

Range <sup>a</sup>	SAMPLE SIZE								
	10	15	25	30	40	50	60	120	240
41.....	172.79	211.62	273.20	299.28	345.58	386.37	423.24	598.55	846.43
42.....	177.00	216.78	279.86	306.58	354.00	395.79	433.56	613.15	867.13
43.....	181.00	221.94	286.53	313.88	362.43	405.21	443.89	627.75	887.78
44.....	185.43	227.11	293.19	321.18	370.86	414.64	454.21	642.35	908.43
45.....	189.65	232.27	299.86	328.47	379.29	424.06	464.53	656.95	929.07
46.....	193.86	237.43	306.52	335.77	387.72	433.48	474.86	671.55	949.71
47.....	198.07	242.59	313.18	343.07	396.15	442.91	485.18	686.15	970.36
48.....	202.29	247.75	319.85	350.37	404.58	452.33	495.50	700.75	991.01
49.....	206.50	252.91	326.51	357.67	413.00	461.75	505.83	715.35	1011.65
50.....	210.72	258.07	333.17	364.97	421.43	471.18	516.15	729.94	1033.30

<sup>a</sup> Range for coded values in tenths, one-sixteenth ounce, one-eighth ounce, or other values.

\*\* Based on sub-sample sizes of 5.

If the total minus error as obtained from the sample is greater than the value determined from Table III after applying correction factor and is less than the value shown in Table V it shall be presumed that a shortage exists in the lot, and additional samples shall be taken before taking official action. When additional samples are taken these shall be included with the original sample, excluding any packages having unreasonable individual errors, and the combination shall be treated as a single sample, and the procedure as set forth in Sections 2933.3.8 to 2933.3.11 shall be followed.

#### Final Determination

If, however, the total error as obtained from the sample exceeds the permissible total error as determined from Table V, with correction factor applied as above, and this is also unreasonable under the provisions of Section 12612 of the Business and Professions Code, then it is deemed that a definite shortage exists and appropriate action shall be taken according to the

provisions of Section 12211, Division 5, Chapter 2, Article 2 of the Business and Professions Code.

(*Example:* Since, in the examples previously used the lot size was 200 and the sample size 15 the percentage is  $7\frac{1}{2}$  percent ( $15 \div 200 \times 100$ ) and, therefore, from Table IV the correction factor is .96. Furthermore, from the Example II, the average range is 3.00 and the corresponding value from Table III is 8.56 for a sample size of 15. Then, 8.56 multiplied by .96 equals 8.22. This is the value to be used to indicate a possible shortage, based upon Table III. This also means that any minus total error obtained from the sample must not exceed minus 8.22 for the lot to be acceptable. In Example II the Corrected Total Error is minus 12, which exceeds minus 8.22, so therefore the lot continues to be of doubtful acceptability. The total permissible error for Example II is 15.48, or the value of 16.13 from Table V for the range of 3.00 and sample size of 15, times .96, the correction factor from Table IV. Since the Corrected Total Error of Example II is minus 12, which is less than 15.48, it cannot be presumed a definite shortage exists.)

(*Example:* Therefore the status of the lot in this example has not been ascertained definitely by these procedures, and the decision to continue sampling until a definite conclusion can be reached depends upon the discretion of the weights and measures official.)

(c) All packages having a minus error greater than the unreasonable individual error as determined in Sec-

tion 2933.3.10, and also unreasonable under the provisions of Section 12612 of the Business and Professions Code, shall be held to be in violation and appropriate action shall be taken with regard to these individual packages.

*History:* 1. Amendment of subsections (b) and (c) filed 8-25-70; effective thirtieth day thereafter (Register 70, No. 35).

2933.3.13. *Procedure to Be Used.* The procedure stated herein shall be used unless the average net content of the lot is determined by 100 percent sampling (weighing, measuring, or counting the contents of all of the packages in the lot). The "Sample Sizes" as specified in Table I of this procedure shall be considered as the minimum sample size for a given lot size, and at the sealer's discretion, may be increased for a given lot size from Table I.

However, the acceptance criteria as set forth in Section 2933.3.12 are to apply in determining appropriate action. Furthermore, packages found to have individual unreasonable errors as determined by Section 2933.3.10 shall be excluded from the calculations of the lot average when using a 100 percent sample.

2933.3.14. *Range Variation Data.* The Department shall accumulate information and data pertaining to the weight, measure or count range variations of prepackaged commodities and may establish upper and lower control limits to prevent the manipulation of the range factor by any person, firm or corporation.



Procedure: Commodities Sold by Volume  
in "Standard-Pack" or "Random-Pack" Packages

2933.3.20. *Procedures for Commodities Sold by Volume in Standard-Pack or Random-Pack.* All of the procedures set forth in Section 2933.3 through and including Section 2933.3.13 of this Article shall apply to this procedure.

Article 5.1. Procedures to Determine Accuracy of  
Net Weight Statements for Packaged Meat and Meat  
Products and Poultry and Poultry Products, and  
Required Action for Short Weight Packages

2940. *Application of Article.* (a) This Article shall apply only during proceedings in the cases of *Rath Packing Company vs. Becker, et al.* and *Rath Packing Company vs. People of the State of California, et al.*, Nos. 72-607-R and 72-608-R, respectively, United States District Court, Central District of California. This Article is adopted as a temporary authority to protect California wholesalers, retailers, and consumers against short weight packages of meat and meat products and poultry and poultry products.

(b) This Article is based on the director's interpretation of applicable law that:

(1) Weight statements placed on packages of meat and meat products and poultry and poultry products by the packager are intended to, and do, represent to the purchaser that the usable contents of the package at the time of purchase is equal to the label weight and the purchaser is entitled to rely on that representation;

(2) The State of California has a responsibility to mark off sale packages which contain less

usable product at time of retail sale than is represented by the label weight; and

(3) Permitting the sale of packages which contain less usable product than the label weight promotes unfair competition among processors.

NOTE: Authority cited: Sections 12027 and 12609, Business and Professions Code. Reference: Sections 12024, 12024.5, 12601, 12603 and 12607, Business and Professions Code.

*History:* 1. New Article 5.1 (Sections 2940, 2940.1, and 2940.2) filed 4-19-73 as an emergency; effective upon filing (Register 73, No. 16).

2. Certificate of Compliance filed 8-16-73 (Register 73, No. 33).

2940.1. *Package Inspection.* (a) Each sealer of weights and measures shall, within his county, inspect packages of meat and meat products and poultry and poultry products to determine whether the label weight stated on the package is accurate at time of inspection.

(b) The determination of accuracy shall be made by weighing all of the usable product within the container, exclusive of wrappers and packing substances.

(c) As an alternate procedure to the procedure stated in subsection (b), the sealer of weights and measures shall establish an accurate tare weight for the containers within a lot of packages and weigh each of the inspected packages. He shall:

(1) Remove 3 packages from the lot at random and weigh each of the unopened packages;

(2) Remove from each of the 3 containers all of the usable product, exclusive of wrappers and packing substances; and

(3) Determine the tare weight for each of the 3 packages separately by subtracting the weight of the usable product from the gross weight.

He shall weigh separately each of the packages in the lot to be inspected and apply as a tare weight for purposes of the lot the lowest tare weight obtained by the above procedure.

(d) For purposes of the procedure specified in subsection (c), a lot is defined as a group of packages assembled in one place, of the same product and brand, in apparently identical containers, bearing the same statement of weight.

2940.2. *Off Sale Procedures.* (a) The sealer of weights and measures shall order off sale all packages which are found to be short weight under either procedure stated in Section 2940.1. He shall record on a form specified by the director the shortage determined for each package marked off sale.

(b) He shall attach to such packages a notice that they may not again be placed on sale until an accurate statement of weight is placed on each package.

**Federal Food, Drug, and Cosmetic Act,  
52 Stat. 1047, 21 U.S.C.**

§ 343. *Misbranded food*

A food shall be deemed to be misbranded—

(a) If its labeling is false or misleading in any particular. . . .

(e) If in package form unless it bears a label containing (1) the name and place of business of

the manufacturer, packer, or distributor; and (2) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count: *Provided*, That under clause (2) of this subsection reasonable variations shall be permitted, and exemptions as to small packages shall be established, by regulations prescribed by the Secretary.

**Federal Wholesome Meat Act,  
81 Stat. 584, 600, 21 U.S.C.**

§ 601. *Definitions*

As used in this chapter, except as otherwise specified, the following terms shall have the meanings stated below:

(n) The term “misbranded” shall apply to any carcass, part thereof, meat or meat food product under one or more of the following circumstances:

(1) if its labeling is false or misleading in any particular; . . . .

(5) if in a package or other container unless it bears a label showing (A) the name and place of business of the manufacturer, packer, or distributor; and (B) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count: *Provided*, That under clause (B) of this subparagraph (5), reasonable variations may be permitted, and exemptions as to small packages may be established, by regulations prescribed by the Secretary;

§ 678. *Non-Federal jurisdiction of Federally regulated matters; prohibition of additional or different requirements for establishments with inspection serv-*



*ices and as to marking, labeling, packaging, and ingredients; recordkeeping and related requirements; concurrent jurisdiction over distribution for human food purposes of adulterated or misbranded and imported articles; other matters*

\* \* \*

Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State or Territory or the District of Columbia with respect to articles prepared at any establishment under inspection in accordance with the requirements under subchapter I of this chapter, but any State or Territory or the District of Columbia may, consistent with the requirements under this chapter, exercise concurrent jurisdiction with the Secretary over articles required to be inspected under said subchapter I, for the purpose of preventing the distribution for human food purposes of any such articles which are adulterated or misbranded and are outside of such an establishment. . . .

**9 Code of Federal Regulations,  
Section 1.8b(q), Page 17.**

The declaration of net quantity of contents shall express an accurate statement of the quantity of contents of the package. Reasonable variations caused by loss or gain of moisture during the course of good distribution practice or by unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large.

**21 Code of Federal Regulations,  
Section 317.2(h)(2), Page 503.**

The statement as it is shown on a label shall not be false or misleading and shall express an accurate statement of the quantity of contents of the container exclusive of wrappers and packing substances. Reasonable variations caused by loss or gain of moisture during the course of good distribution practices or by unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large.

**Memorandum Order.**

**United States Court of Appeals, Second Circuit.**

**At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of January, one thousand nine hundred and seventy-five.**

Present: Hon. Irving R. Kaufman, Chief Judge.

Hon. Wilfred Feinberg, Hon. Walter R. Mansfield, Circuit Judges.

General Mills, Inc., a corporation, The Pillsbury Company, a corporation, Seaboard Allied Milling Corporation, a corporation, Plaintiffs-Appellants v. Betty Furness, Commissioner, Department of Consumer Affairs, City of New York, Defendant-Appellee. 74-2039.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments and order of said District Court be and they hereby are affirmed with costs to be taxed against the appellants.

A. DANIEL FUSARO,

Cerk

By: /s/ Vincent A. Carlen  
Chief Deputy Clerk

**United States District Court, Southern District of New York.**

**General Mills, Inc., a Corporation; The Pillsbury Company, a Corporation; Seaboard Allied Milling Corporation, a Corporation, Plaintiffs, v. Betty Furness, Commissioner, Department of Consumer Affairs, City of New York, Defendant. 73 Civ. 2497.**

OPINION

Plaintiffs, who are manufacturers and packagers of wheat flour, bring this action for a declaratory judgment. Jurisdiction is based on 28 U.S.C. §§ 1331(a), 1332(a), 1337.

They have moved for a preliminary injunction against the Commissioner of Consumer Affairs, City of New York, to restrain the enforcement of Section 833-16.0 of the Administrative Code of the City of New York against their flour products on the ground that the ordinance is preempted by the federal Fair Packaging and Labeling Act, 15 U.S.C. §§ 1451, *et seq.*, and the Foods, Drug, and Cosmetic Act, 21 U.S.C. §§ 301 *et seq.* violates Due Process, and imposes a burden on interstate commerce. The Commissioner of Consumer Affairs in turn moves for summary judgment.

Oral argument was heard on both motions on January 28, 1974. The court denies plaintiffs' motion for a preliminary injunction and grants defendant's motion for summary judgment in part.

Inspectors of the Department of Consumer Affairs have visited several retailers and have issued violations for packages the contents of which weighed less than the five pounds marked on the packages.



The parties agree that flour is a hygroscopic substance, that is, its moisture content fluctuates with changes in the moisture level of the surrounding atmosphere.

The federal Fair Packaging and Labeling Act prohibits the distribution in interstate commerce of packaged consumer commodities unless in conformity with regulations enacted pursuant to section 1455 and unless "[t]he net quantity of contents (in terms of weight, measure, or numerical count) shall be separately and accurately stated in a uniform location upon the principal display panel of that label. . . ." 15 U.S.C. § 1453(a).

The federal regulations provide that

"[t]he declaration of net quantity of contents shall express an accurate statement of the quantity of contents of the package. Reasonable variations caused by loss or gain of moisture during the course of good distribution practice or by unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large." 15 C.F.R. § 1.8b(q).

The federal Food, Drug and Cosmetic Act similarly prohibits the introduction or delivery for introduction into interstate commerce of any food that is misbranded. 21 U.S.C. § 331(a). The Act further provides that food packages are misbranded unless they contain an accurate statement of the quantity of the contents, provided that ". . . reasonable variations shall be permitted . . ." by regulation. 21 U.S.C. § 343(e).

Finally, Section 833-16.0 of the Administrative Code of the City of New York provides in pertinent part:

"It shall be unlawful to sell or offer for sale any commodity or article of merchandise, at or for a greater weight or measure than the true weight or measure thereof. . . ."

Plaintiffs claim that the ordinance does not permit reasonable weight variations resulting from loss of moisture. Defendant, on the other hand, argues that, like the applicable federal statutes, the ordinance does allow for reasonable variations.

The court agrees with defendant's interpretation of the ordinance. See *Emerald Packing Corp. v. Hygrado Food Products*, 200 N.Y.S.2d 534, 23 Misc.2d 915 (App. Div. 1st Dept. 1960).

Defendant further argues that the Department treats variations from a table of "unreasonable minus or plus errors" contained in a handbook prepared by the U.S. Department of Commerce, National Bureau of Standards, (Handbook 67 National Bureau of Standards, Exhibit A, attached to Answer), as prima facie violations. The manual was intended for use by state and local weights and measures officials and describes "a method for controlling various types of pre-packaged commodities." (Handbook 67, p. 1).

According to defendant, once a prima facie violation of § 833-16.0 is found, the burden is placed on the retailer to show that the shortweight errors were unavoidable and caused by ordinary and customary exposure to conditions that normally occur in good distribution practice.

### Standing

Plaintiffs have standing to bring this action even though the violations complained of have been issued against retailers who are not before the court.

In order to have standing, a party must allege "... that the challenged action has caused him injury in fact, economic or otherwise." Moreover, it must appear that the interest sought to be protected by the plaintiff is arguably within the zone of interests regulated by statute or the Constitution. *Data Processing Service v. Camp*, 397 U.S. 150 (1970).

Plaintiffs in this action have alleged that defendant's actions have damaged their reputations among retailers and the general public. (Complaint, ¶29). Moreover, it is arguable that plaintiffs are within the "one or more interests regulated by the Constitution and federal statute.

### Summary Judgment

There does not seem to be any dispute that defendant's inspectors issue violations only when the flour packages' weight shortages are more than 3/8ths of an ounce, the amount of error said to be unreasonable in Handbook 67, pp. 7-8. (Defendant's Statement Pursuant to Rule 9(g), ¶5).<sup>1</sup>

<sup>1</sup>Plaintiffs deny Paragraph 5 of Defendant's Rule 9(g) statement to the extent it is inconsistent with paragraphs 28, 29 and 30 of their Rule 9(g) statement. Plaintiffs' Statement Pursuant to Rule 9(g), 135. In paragraphs 28-30, and the affidavit referred to therein, however, plaintiffs merely allege that defendant has misinterpreted Handbook 67 and should not have used the table of "errors", which appears at p. 8, as a guide to the reasonableness of weight variations resulting from changes in moisture content.

Therefore, the court will assume that defendant's inspectors make some allowance for variations in net weight.

The court will now consider each of plaintiffs' constitutional and statutory claims.

### 1. Commerce Clause

The court holds that the commerce clause does not forbid state and local regulation of weights and measures of packages which have been transported in interstate commerce for the reasons stated in Judge Friendly's opinion in *Swift & Company v. Wickham*, 230 F.Supp. 398, 402-03 (S.D.N.Y. 1964) (three-judge court), *aff'd* 364 F.2d 241 (2d Cir. 1966), *cert. denied*, 385 U.S. 1036 (1967). The framers of the Constitution did not intend to preclude state or municipal regulations of weights and measures, "one of the oldest exercises of governmental regulatory power." *Id.* at 402.

However, it may be that the city ordinance, as enforced by defendant, unduly burdens interstate commerce and is, therefore, unconstitutional. *See Florida Avocado Growers v. Paul*, 373 U.S. 132, 152-156 (1963).

Plaintiffs will, therefore, be permitted, on the trial of the permanent injunction, to prove that the city ordinance is unnecessarily burdensome. In this connection, they would have to prove first that the ordinance, as it is enforced, imposes standards substantially more stringent than those of the applicable federal laws. Furthermore, plaintiffs would have to prove that the municipal requirements exceed the limits necessary to vindicate legitimate local interests, unreasonably favor



local producers, or constitute an illegitimate attempt to control the conduct of packages beyond the borders of New York. See *Florida Avocado Growers, supra*, at 154.

## 2. Due Process

There is no merit to plaintiffs' claim that defendant, by failing to allow for reasonable variations from the stated net weight of the packages, has violated their right to due process guaranteed by the Fourteenth Amendment.

"... [R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1933).

Defendant, charged by N.Y. Agriculture and Markets Law, § 183, and Administrative Code of the City of New York, § 833-21.0, with the responsibility of determining whether violations should be issued pursuant to applicable municipal ordinances and state statutes prohibiting unreasonable weight variations, could have rationally concluded that, ordinarily, weight variations greater than those indicated on p. 8 of Handbook 67 were unjustified. Neither procedural nor substantive due process requires absolute certainty to support the issues of a violation.

## 3. Applicable Federal Statutes

Finally, the court holds that the municipal ordinance is not preempted by either the federal Fair Packaging

and Labeling Act or the Food, Drug and Cosmetic Act.

" '[F]ederal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.' " *Florida Avocado Growers, supra*, at 142.

Compliance with both federal and local regulations is not a physical impossibility and, therefore, the nature of the regulated subject matter does not require a conclusion that the federal regulations preempt the local ordinance.

There would seem to be an irreconcilable conflict only if the local ordinance required plaintiffs to do something which the federal statutes and regulations prohibited.

This would be the case if, in order to comply with the local ordinance, plaintiffs were required to overfill their packages in order to compensate for inevitable moisture losses, in amounts that would place them in violation of the federal statutes and regulations.

However, as plaintiffs have argued, federal law permits reasonable variations from stated weights. Plaintiffs have not offered any support for their argument that overfills sufficient to avoid liability under the New York ordinance would be deemed unreasonable under the federal statutes and regulations.

Finally, Congress has not manifested an intention to preempt all ordinances relating to labeling of packages which have been in interstate commerce.

The Supreme Court has already held that the Food and Drug Act is not preemptive of state regulation. *Corn Products Ref. Co. v. Eddy*, 249 U.S. 427 (1919).

The Fair Packaging and Labeling Act provides:

"It is hereby declared that it is the express intent of Congress to supersede any and all laws of the States or political subdivisions thereof insofar as they now or hereafter provide for the labeling of the net quantity of contents of the package of any consumer commodity covered by this chapter which are less stringent than or require information different from the requirements of section 1453 of this title or regulations promulgated pursuant thereto." 15 U.S.C. § 1461.

The Conference report, in its explanation of this provision, quoted from the House of Representatives report as follows: state laws or regulations with respect to the labeling of net quantity of packages which impose "... inconsistent or less stringent requirements ..." would be preempted. *U. S. Code Congressional and Administrative News*, 1966 p. 4094.

It, therefore, appears that Congress intended to preempt only those state laws or regulations which were *less stringent* or incompatible with the new federal statute. Since plaintiffs argue that the city ordinance is more stringent than the federal law and since the court has concluded that the two laws are not incompatible,<sup>2</sup> the municipal ordinance is not preempted.

The court accordingly grants defendant's motion for summary judgment in part. The trial of the permanent injunction will be limited to the issue of whether the

<sup>2</sup>See pp. 9-10, *supra*.

municipal ordinance unduly burdens interstate commerce.

### *Preliminary Injunction*

The two-fold requirement for a preliminary injunction is a demonstration of probability of success on the merits and a showing that irreparable harm will result if such relief is denied, *Gulf & Western Industries, Inc. v. The Great Atlantic & Pacific Tea Company, Inc.*, 476 F.2d 687 (2d Cir. 1973), or that serious questions are raised and the balance of hardships tips sharply in plaintiffs' favor. *Charlie's Girls, Inc. v. Revlon, Inc.*, ..... F.2d ....., Docket No. 73-2002 (2d Cir., decided Aug. 30, 1973).

In view of this court's disposition of defendant's summary judgment motion, plaintiffs will prevail on the merits only if they can prove that Section 833-16.0 of the Administrative Code of the City of New York unduly burdens interstate commerce. Plaintiffs have not made any showing that they will be able to meet that burden. Nor do the equities tip decidedly in plaintiffs' favor.

The motion for a preliminary injunction is accordingly denied.

Dated: New York, New York

February 22, 1974

CONSTANCE BAKER MOTLEY  
U. S. D. J.



**United States District Court, Southern District of New York.**

**General Mills, Inc., a Corporation; the Pillsbury Company, a Corporation; Seaboard Allied Milling Corporation, a Corporation, Plaintiffs, v. Betty Furness, Commissioner, Department of Consumer Affairs, City of New York, Defendant. 73 Civ. 2497.**

*Memorandum Opinion and Order*

Plaintiffs, who are manufacturers and packagers of wheat flour, have brought this action for a declaratory judgment. Jurisdiction is based on 28 U.S.C. §§ 1331 (a), 1332(a) 1337.

Plaintiffs have requested injunctive relief against the Commissioner of Consumer Affairs, City of New York, to restrain the enforcement of Section 833-16.0 of the Administrative Code of the City of New York against retail distributors of their flour products.

The ordinance makes it “. . . unlawful to sell or offer for sale any commodity or article of merchandise, at or for a greater weight or measure than the true weight or measure thereof. . . .”

The essence of plaintiff's claim is that the city ordinance does not allow for reasonable weight variations resulting from inevitable losses of moisture and, therefore, violates Due Process and imposes a burden on interstate commerce. Plaintiffs also claim that the ordinance is preempted by the federal Fair Packaging and Labeling Act, 15 U.S.C. § 1451, *et seq.*, and the Food, Drug, and Cosmetic Act, 21 U.S.C. § 301, *et seq.*

The court, in an opinion dated February 22, 1974, ruled that the ordinance did allow for reasonable weight variations resulting from moisture loss. The court also ruled that the ordinance, as applied, did not deny plaintiffs their rights under the Due Process Clause and that the Commerce Clause does not bar all state and local regulation of weights and measures of packages which have been transported in interstate commerce. The court denied plaintiffs' motion for preliminary injunction and granted defendant's motion for summary judgment, in part. The court limited trial of the permanent injunction to the question whether the city ordinance unnecessarily burden interstate commerce. It was ruled that plaintiffs would have to prove first that the ordinance, as applied, imposed standards substantially more stringent than those of applicable federal laws *and* that the municipal requirements exceeded the limits necessary to vindicate legitimate local interests, unreasonably favored local producers, or constituted an illegitimate attempt to control the conduct of packagers beyond the borders of New York State. *Florida Avocado Growers v. Paul*, 373 U.S. 132, 154 (1963).

The trial of the permanent injunction was concluded on May 1, 1974. The court at that time denied plaintiffs' motion for a permanent injunction and granted defendant's motion to dismiss the complaint for the reasons herein.

It appears that the city ordinance is substantially more stringent than the applicable federal statutes, as applied. Both the city ordinance and federal regulation permit reasonable variations caused by loss of

moisture during the course of good distribution practice.<sup>1</sup>

However, plaintiffs offered testimony that federal inspectors do not examine packages on retailers' shelves. (Testimony of Malcolm Jensen). Since much of the moisture loss occurs after the packages leave the manufacturers' plants, examinations by city inspectors conducted at retail stores are likely to result in discoveries of moisture losses which federal inspectors do not detect.

Nevertheless, plaintiffs have not shown that the city ordinance is unnecessarily burdensome. There has been no showing that the ordinance's enforcement unreasonably favors local producers and plaintiffs have not shown that the municipal requirements exceed the limits necessary to vindicate legitimate local interests.

In view of a municipality's interest in regulating weights and measures, "one of the oldest exercises of governmental regulatory power," *Swift & Company v. Wickham*, 230 F. Supp. 398, 402 (S.D.N.Y. 1964) (three-judge court), *aff'd*, 364 F.2d 241 (2d Cir. 1966), *cert. denied*, 385 U.S. 1036 (1967), a city must be afforded wide discretion in determining what variations from stated weights are reasonable.

<sup>1</sup>With regard to the city ordinance, see this court's opinion, dated February 22, 1974, at p. 4.

The federal regulation provides as follows:

"The declaration of net quantity shall express an accurate statement of the quantity of contents of the package. Reasonable variations caused by loss or gain of moisture during the course of good distribution practice or by unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large." 21 C.F.R. 1.8b (q) (1973).

Plaintiffs' principal argument is that defendant, in issuing violations against retailers, mechanically applies a table of "unreasonable minus or plus errors" contained in a handbook prepared by the U.S. Department of Commerce, National Bureau of Standards, (Handbook 67, National Bureau of Standards, Exhibit A, attached to Answer). Plaintiffs contend that the table was not intended to apply to weight variations resulting from moisture losses and, therefore, does not make adequate allowance for such losses. However, it is not enough to show that defendant applies the table in a manner contrary to the intent of the handbook's author. The question, for purposes of the Commerce Clause, is whether the city's requirements exceed the limits necessary to vindicate its interest in protecting consumers from misleading labeling practices.

The handbook has no binding effect on states or municipalities since it merely describes "a method for controlling various types of pre-packaged commodities." (Handbook 67, p. 1). The question is whether the city is acting reasonably when it concludes that variations of the magnitude described in the table are ordinarily unjustified, bearing in mind that the table is only used to determine whether there has been a *prima facie* violation of the ordinance.

The court cannot find that the city is acting unreasonably when it issues violations based on weight variations in excess of those allowed in the table. As the court held in its opinion of February 22, 1974, the city could rationally conclude that ordinarily weight variations greater than those indicated in the table were unjustified. Such variations may be the result of factors other than moisture loss, such as under-fills by the



packagers or leaks in the packages. Variations may also be the result of excessive moisture losses resulting from poor distribution practices. An inspector cannot be required to determine, in advance of issuing a summons, whether a weight variation is impermissible. It is enough that after the summons is issued the retailer be afforded a reasonable opportunity to show that the weight variation was unavoidable.

In this connection, the city contends that when a violation is issued, the retailer is afforded an opportunity to meet informally with city officers to attempt to reach a settlement with the city. If a settlement cannot be reached or if a retailer fails to appear at the settlement conference, the city could commence civil proceedings to collect a penalty of \$100 for each violation, Administrative Code of the City of New York, § 833-22.O, or criminal prosecutions, § 322.23.O. Plaintiffs have made no showing that the fact that weight variations resulted from inevitable moisture losses would not be recognized as a defense in such proceedings. They have, therefore, failed to show that the ordinance, as applied, exceeds the limits necessary to protect the city's legitimate interest in fair packaging.<sup>2</sup>

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<sup>2</sup>Plaintiffs have not argued that there is no legitimate interest in preventing excessive moisture losses, although they did argue, unsuccessfully, on the defendant's summary judgment motion, that the city, as opposed to the federal government, had no such legitimate interest.

It is arguable that there is no legitimate interest because the consumer can always add tap water to make up for excessive moisture losses. However, the consumer would ordinarily have no way of knowing that water could be added without diluting the mix. The city might rationally conclude that consumers

Finally, the court finds that the ordinance, as applied, does not constitute an illegitimate attempt to control the conduct of packagers beyond the borders of New York. The city has a legitimate interest in regulating weights and measures even though its regulations may inevitably require out-of-state packagers to alter their practices to conform to the local standards. So long as the city acts reasonably, such regulations do not unnecessarily burden interstate commerce.

Plaintiffs' motion for a permanent injunction is denied and defendant's motion to dismiss the complaint is granted.

Dated: New York, New York

July 2, 1974                      So Ordered.

/s/ Constance Baker Motley  
CONSTANCE BAKER MOTLEY  
U.S.D.J.

---

who did not know that their flour packages were short-weighted as a result of moisture losses and that additional water could, therefore, be added to recipes without diluting the mix would, in order to meet their cooking needs, end up buying more flour than they would have if excessive moisture had not been lost.

It might be noted that the federal regulation also seems to proscribe variations from stated weight caused by excessive moisture losses. See p. 4, and n. 1, *supra*.

IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1975  
Nos. 75-1052 and 75-1053

Supreme Court, U. S.

FILED

FEB 17 1976

MICHAEL RODAK, JR., CLERK

M. H. BECKER, as Director of the County  
of Los Angeles Department of Weights  
and Measures,

Petitioner,

v.

THE RATH PACKING COMPANY, a corporation,  
Respondent,

JOSEPH W. JONES, as Director of the  
County of Riverside, California,  
Department of Weights and Measures,  
Petitioner,

v.

GENERAL MILLS, INC., a corporation; THE  
PILLSBURY COMPANY, a corporation;  
SEABOARD ALLIED MILLING CORPORATION, a  
corporation; and THE RATH PACKING  
COMPANY, a corporation,

Respondents,

PETITION FOR A WRIT OF CERTIORARI  
TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

BRIEF OF THE APPELLATE COMMITTEE  
OF THE CALIFORNIA DISTRICT ATTORNEYS  
ASSOCIATION AS AMICUS CURIAE ON  
BEHALF OF PETITIONER

California District  
Attorneys Association by

JOHN M. PRICE  
District Attorney  
County of Sacramento  
301 Courthouse  
720 Ninth Street  
Sacramento, Calif. 95814

Of Counsel: Arjuna T. Saraydarian  
Deputy District Attorney



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MOTION FOR LEAVE TO FILE AMICUS  
CURIAE BRIEF IN SUPPORT OF THE  
PETITIONS FOR WRITS OF CERTIORARI

The California District Attorneys Association, pursuant to Rule 42, of the Supreme Court Rules, respectfully petition this Honorable Court for leave to file the accompanying Amicus Curiae brief in support of Petitioners' petitions for Writ of Certiorari in the cases of Rath vs. Becker, \_\_\_F.2d\_\_\_ (1975) (Nos. 73-2481, 73-2482, 73-3902, 73-2496, 73-3180) (Hereafter, Rath), and General Mills, et al. vs. Jones, \_\_\_F.2d\_\_\_ (1975) (Nos. 74-1051, 73-3583) (Hereafter, General Mills).

The Amicus brief will be filed by the Appellate Committee of the Association. The Committee was created by the district attorneys of the several counties of California to utilize and coordinate the

resources of the district attorney's offices throughout the State for the purpose of presenting their views in cases which may have major impact upon their functions and the performance of their duties in their quest to protect the citizens of their respective counties.

After reviewing the matter presented herein, the Appellate Committee concluded that the cases of Rath and General Mills will have a major impact upon the ability of the State of California to enforce short-weight regulations and to protect the California consumer from fraudulent practices.<sup>1/</sup> Rath and General Mills held that federal law

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<sup>1/</sup> The district attorney in California is charged with the enforcement of the various laws in the field of consumer protection. Any district attorney may bring an action for injunctive relief against persons who engage in unfair competition which includes unfair or fraudu-

preempted California Business and Professions Code §12211 and the procedures used by California in the enforcement of Bus. & Prof. Code § 12607 both of which sections were or would have been utilized by the several district attorneys in bringing actions against Rath and General Mills, et al.

Because of the concern of the California district attorneys about the impact of Rath and General Mills upon the continued viability of these stricken provisions, the California District Attorneys Association authorized its

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lent business practice and unfair deceptive, untrue or misleading advertising (California Civil Code §3369); to prevent violations of California's Bus. & Prof. Code §§17500 et seq. which concern false advertising (Bus. & Prof. Code §17535); for recovery of civil penalties in cases of false advertising (Bus. & Prof. Code §17536); to bring an action for civil damages and injunctive relief to restrain violations of the Sherman Food, Drug, and Cosmetic Law (California Health and Safety Code §§2600 et seq.)



Appellate Committee to seek permission to file the instant amicus brief.

The Amicus Curiae Brief will show the extensiveness of California's involvement in this area of consumer protection and the significance of Rath and General Mills to the enforcement of local regulations of weights and measures. California Department of Agriculture tables are attached as an appendix to the Brief showing the various results of weight inspection in different types of food products, and the amounts rejected as short-weighted. Amicus will

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which includes provisions concerning packaging, labeling, and advertising (Cal. Health and Safety Code §§26850, 26851). Furthermore, Bus. & Prof. Code §12024 provides that every person who sells any commodity in less quantity than he represents it to be is guilty of a misdemeanor, and since the district attorney "shall attend the courts, and conduct on behalf of the people all prosecution for public offenses", Cali-

also present legal arguments which were not fully developed by other briefs, which arguments relate to the "local" nature of the field of regulations involved in Rath and General Mills, and also relate to Amicus' position that the federal laws in this area, by the very nature of their application in theory and in practice, do not extend to food products which are not in interstate commerce. (See attached brief, pp. 33-40.)

For the reasons set forth above the California District Attorneys Association request that it be granted leave to file

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ifornia Government Code §26500, and "public offense" include misdemeanors, California Penal Code §16, the various district attorneys are involved in criminal prosecutions arising from such violations.

the attached brief prepared by its  
Appellate Committee.

Respectfully submitted on behalf  
of the California District Attorneys  
Association,

JOHN M. PRICE  
District Attorney  
County of Sacramento

By Arjuna T. Saraydarian  
Deputy District Attorney

Attorneys for Amicus Curiae

JURISDICTIONAL GROUND

The California District Attorneys  
Association as amicus curiae, respect-  
fully files this brief pursuant to Rule  
42, of the Supreme Court Rules.



SUMMARY OF ARGUMENT

The questions presented by Rath and General Mills are significant because of the great extent that the State of California is involved in protecting its consuming public. The matter of whether State officials can order short-weighted food products off-sale has been presented to different Circuits resulting in different decisions. These reasons warrant a Writ of Certiorari.

In addition, an analysis of the opinions of the Court of Appeals, although persuasive at first glance, does not withstand analytical scrutiny. The matters regulated here involve items which are no longer in interstate commerce and there was no intent to preempt same. In fact, careful analysis of the applicable legislation indicates

a clear Congressional intent to join with the States in protecting the consuming public.

STATEMENT OF THE CASE

Actions were filed in Los Angeles and Riverside counties of the State of California against Rath Packing Company (hereafter Rath) for civil penalties and injunctive relief, charging Rath with the continued sale of short-weighted packages of bacon. It was alleged that the net weight contents of packages of bacon which were processed, packaged, labeled, sold, and distributed by Rath were, when offered for retail sale to the consuming public, frequently found to weigh less than the net weight stated thereon, thus causing consumers to be deceived and misled by sale of such "misbranded" food. At one time, while less than 2% of the packages of various brands of bacon inspected by county inspectors were found to weigh less than the amount stated on the face of the

packages, in the case of bacon packaged by Rath, approximately 50% of the samples were found to be short-weighted. The difference between the net weight stated on the labels and the actual net weight of the contents of the packages of Rath bacon when offered for retail sale to the consuming public were found to range from 1/16 ounce to 1½ ounces. (People's brief in the case of People vs. Rath, page 4)2/.

Local county officials had conducted their inspections in accordance with the procedures set forth in 4 California Administrative Code Chapter 8, subchapter 2, article 5, which were promulgated by the California Director

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2/ People vs. Rath, California Court of Appeal, Second District, 2d Civ. No. 42367 - Clerk's trans. p. 100, line 1-5, p. 538, line 17 to p. 539, line 24.

of Agriculture pursuant to his authority under California's Business and Professions Code § 12211.

The General Mills case involves the packaging and weighing of flour sold to consumers for home use. General Mills, et al. manufacture, package, label, and distribute wheat flours.

The State of California has been extensively active in the inspection of short-weighted consumer products (Appendix ) and has for years protected the California consuming public. Local inspectors of the several California counties have performed their inspections and done so within the full knowledge of the federal compliance

officers<sup>3/</sup>, the latter for the most part, relying upon the local inspectors for the day-to-day monitoring of such consumer products. (Rep. Tr. pp. 371-76, 383-84).

Rath filed an action in the U.S. District Court, Central District, California, seeking to enjoin directors of county department of weights and measures from applying provisions of the California law (Bus. & Prof. Code § 12211 and its implementation in the Cal. Admin. Code) on, among other things, the ground that such State law is preempted by provisions of the Federal Wholesome Meat Inspection Act (WMA) (21 USC, §§

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<sup>3/</sup> Vinton L. Hutchings, Officer-in-Charge, Western Region, USDA Compliance staff, supervises seven USDA compliance officers for the twelve western states (including Alaska and Hawaii) (Rep. Tr. pp. 371-76).



601 et seq.) The District Court agreed with Rath. Rath Packing Company vs. Becker, 357 Fed. Supp. 529 (1973).

General Mills and other Millers filed an action in the same District Court seeking relief similar to that of Rath, claiming that California law (Bus. & Prof. Code §§ 12211 and 12607, Cal. Admin. Code Ch. 8, subch. 2) was preempted by the Provisions of the Federal Food, Drug and Cosmetic Act (FDCA) (21 USC, §§ 301 et seq.). The District Court again agreed with the Plaintiffs General Mills, et al. vs. Jones, Civil Action No. 73-715-R (1973) (Memorandum Opinion.<sup>4/</sup>

Both Rath and General Mills were appealed to the U.S. Court of Appeals,

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<sup>4/</sup> Said Opinion is attached to the decision of the 9th Circ. U.S. Court of Appeals (No. 74-1051) as an appendix thereto.

Ninth Circuit, and on October 29, 1975, said court rendered its decision in these cases. (Nos. 73-2481, 73-2482, 73-3092, 73-2496, 73-3180, 73-3583, 74-1051) holding inter alia that (a) The Wholesome Meat Act of 1967 (21 USC, §§ 601 et seq., and 9 CFR, 317.2 (h)(2) preempt California Bus. & Prof. Code § 12211 and 4 Cal. Admin. Code Ch. 8, subch. 2, art. 5, 5.1 and partially preempt California Bus. & Prof. Code § 12607. And, (b) The Food, Drug, and Cosmetic Act, the Fair Packaging and Labeling Act, and 21 CFR, 1.86(q) preempt Bus. & Prof. Code §12211 and 4 Cal. Admin. Code Ch. 8, subch. 2, 2.1.

ARGUMENT

## I

CERTIORARI IS APPROPRIATEWHERE THE QUESTIONSRAISED ARE SIGNIFICANT

Certiorari is appropriate where a particular question is important and recurring. Glus vs. Brooklyn Eastern District Terminal, 359 U.S. 231 (1959). The significance and importance of the area of the law concerning the protection of the consumer is reflected in the statutory scheme and the legislative history of the various provisions of law that regulate meat and flour products. For example, the Federal Wholesome Meat Act of 1967 contains the finding that:

"...Unwholesome, adulterated, or misbranded meat or meat food products impair the effective regulation of meat and meat

food products in interstate or foreign commerce, are injurious to the public welfare, destroy markets for wholesome, not adulterated, and properly labeled and packaged meat and meat food products, and result in sundry losses to livestock producers of meat and meat food products, as well as injury to consumers."

21 USC, §602.

Such a statement of purpose would likewise apply to flour products and other consumer products. The growing field of regulation of such products and the enforcement of consumer protection laws through law enforcement agencies and consumer protection bureaus attest the significance of and inherent probability of the recurrence of the ques-

tions raised by the Rath and General Mills cases. The U.S. District Court in Rath vs. Becker, 357 Fed. Supp. at page 534 held that 9 CFR, 317.2 (h)(2) which is the purported implementation of 21 USC, §601(n)(5) was "void for its inadequacy to set any recognizable standards\*\*\*." The Court of Appeals reversed this ruling but observed:

"We note the public importance of this question, and the possibility of review of our judgment herein". \_\_\_\_ F. 2d \_\_\_\_, (Slip opinion, page 19).

The Court of Appeals in fact stated that it attempted to "make it clear that by this (General Mills) decision (we) do not deprive California of its unquestioned right to exercise its police powers in the regulation of weights and measures so as to prevent the sale to consumer of

packaged flour and other foods which do not weigh what their labels say they do." \_\_\_\_ F. 2d \_\_\_\_ (Slip opinion, p. 50). But, the Court proceeded to do precisely what it said it did not attempt to do, that is, strike down California's exercise of its police powers.

These rulings are significant for the following reasons: a) The dual ruling in Rath that 9 CFR, 317.2 (h)(2) is not "impossible of application" and that the particular California laws and regulations are invalid leaves the hundreds<sup>5/</sup> of California inspectors of weights and measures with no guidelines other than the words "reasonable varia-

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<sup>5/</sup> As of this writing, there are 404 certified county inspectors and 67 state certified inspectors in California (Information obtained from the State of California Department of Weights and Measures.



tions". The issue will hardly lie dormant. Each such inspector will have to determine what in his opinion is a "reasonable variation" and the doors will be opened for gross inequality in the enforcement of short-weight laws and the protection of consumers in various parts of the state. b) The Court's ruling in General Mills (Slip opinion, page 48) is puzzling. The Court stated that "The federal law requires 'accurate' weight, proscribing packages that are overweight as well as underweight" and thus California law is invalid because the latter "only proscribes sale of lots of packages whose average actual weights are less than the label weights." Aside from the Court's strange worry about the sale of overweight products to consumers, it apparently failed to grasp the significance of what it was

saying, that is, in order to conform to FPLA, a valid California regulation must proscribe any package which weighs more or less than the "accurate" weight. Thus, in its analysis of the FPLA, the court completely ignored its conflicting and contrary analysis of the FDCA and the WMA (see General Mills, p. 47) which took into consideration "reasonable variations" that inevitably occur when packages, due to various causes, including loss of moisture, do not reflect "accurate" weights.

Amicus respectfully suggests that the decisions in Rath and General Mills create significant issues and are of sufficient importance to warrant a hearing before the United States Supreme Court.

## ARGUMENT

## II

CERTIORARI IS APPROPRIATEWHERE A CONFLICT EXISTSBETWEEN CIRCUITS

Where a question of particular significance has been raised in various parts of this country and conflicting decisions have been rendered by different courts of appeals, certiorari would lie to resolve the conflict.

F.T.C. vs. Flotill Products, Inc., 389 U.S. 179 (1967); N.L.R.B. vs. Metropolitan Life, 380 U.S. 438 (1965); Charles Dowd Box Co. vs. Courtney, 368 U.S. 502 (1962); Jarecki vs. G. D. Searle & Co., 367 U.S. 303 (1961); Knetsch vs. U.S., 364 U.S. 361 (1960); Mitchell vs. Robert DeMario Jewelry, Inc., 361 U.S. 288 (1960)

In General Mills, Inc., et al.,

vs. Furness, 398 Fed. Supp. 151

(1974), Plaintiffs brought action seeking injunctive and declaratory relief in an effort to invalidate the New York City weights and measures ordinance. The trial court held that the city had wide discretion in determining what variations from stated weights were reasonable, and even though it appeared that the city ordinance was substantially more stringent than the applicable federal statute, as applied, the Plaintiffs' claim that the ordinance was preempted by the Federal Fair Packaging and Labeling Act,<sup>6/</sup> was not sustained. The Court of Appeals, Second Circuit, affirmed the judgment. 508 F. 2d 836. Also,

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<sup>6/</sup> 15 USC §1451 et seq., and the Food, Drug and Cosmetic Act, 21 USC, §301 et seq.

where the questions raised are of importance to federal-state relations, certiorari would be granted. Leiter Minerals, Inc., vs. U.S., 352 U.S. 200 (1957). In the enforcement of the California statutes and regulations involved here, there has been cooperation and mutual reliance between federal compliance officers and the local weights and measures officials, the latter performing most of the day-to-day inspections of, among other things, the products involved in Rath and General Mills. (See testimony of V. L. Hutchings, reproduced at pages 79-82 of L. T. Wallace's Petition for a Writ of Certiorari. The testimony of this Federal Compliance Officer shows that when it comes to regulation of local weights and measures, these officers defer to the local officials

of weights and measures because they are unable and/or unwilling to assume such duties.<sup>7/</sup>

This cooperative effort to protect the consumer apparently enjoys congressional sanction since the concluding portion of 21 USC, §678 reads:

"\*\*\*but any State\*\*\* may, consistent with the requirements under this chapter, exercise concurrent jurisdiction with the Secretary over articles required to be inspected under said subch. I, for the purpose of preventing the distribution for human food purposes

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<sup>7/</sup> In fact, as set forth in Argument infra, it is doubtful if local enforcement even is within the proper jurisdiction of federal compliance officers.



of any such articles which are adulterated or misbranded and are outside of such an establishment\*\*\*. This chapter shall not preclude any State\*\*\*from making requirement or taking other action, consistent with this chapter with respect to any other matters regulated under this chapter."

In addition, as set forth in footnote of L. T. Wallace's Petition for Writ of Certiorari in the Rath case, at least thirteen states in the union support the granting of certiorari and by so doing these states are also involved in and fully committed to the protection of the consuming public in their various jurisdictions in coopera-

tion with federal authorities. Amicus respectfully suggests that a Writ of Certiorari would be appropriate under these circumstances because there are conflicting opinions in this area which affect federal-State and State-State relations and a resolution of the questions raised is necessary.

## ARGUMENT

## III

ERRONEOUS DECISIONS  
INVOLVING SIGNIFICANT  
ISSUES SHOULD NOT BE  
ALLOWED TO STAND

## A

THE STATE OF CALIFORNIA  
HAS NONCONFLICTING AND  
CONCURRENT JURISDICTION  
IN THE AREA OF PACKAGING  
AND SALE OF  
CONSUMER PRODUCTS

In holding that the applicable California statutes and regulations are preempted by federal law, the trial court and the Court of Appeals ruled that the statistical variations allowed by California from the accurate weight standard imposed by 21 USC §601(n)(5), in the absence of valid

regulations permitting reasonable variations thereunder, created a net weight labeling standard "different than" the federal standard.

California Bus. & Prof. Code §12211, in part, provides that "Each sealer shall, from time to time, weigh or measure packages, containers or amounts of commodities sold, or in the process of delivery, in order to determine whether the same contain the quantity or amount represented and whether they are being sold in accordance with law. The director is hereby authorized and directed to adopt and promulgate necessary rules and regulations\*\*\*. Any such rule or regulation\*\*\*shall not require higher standards and shall not be more restrictive than regulations, if any, promulgated by the Department of

Health, Education and Welfare, Food and Drug Administration, under the provisions of the Federal Food, Drug and Cosmetic Act." (Emphasis added.)

California Health and Safety Code §26551 refers to labeling requirements of packaged food and reads in part:

"Any food is misbranded if it is in package form, unless it bears a label containing all of the following information:

"...(b) An accurate statement of the quantity of the contents in terms of weight, measure or numerical count.

"Reasonable variations from the requirements of subdivision (b) shall be permitted." (Emphasis added.)

California Bus. & Prof. Code §12211, stricken by the Court of Appeals, must be taken in pari materia with Health & Safety Code §26551, and must be interpreted in light of its reference to the requirement that the packaging and labeling be done "in accordance with law" and its reference to the FDCA. California's Director of Agriculture had promulgated in the California Administrative Code procedures which were stricken by the Court of Appeals, which procedures were being used as a tool for inspectors of weights and measures to implement the consumer protection laws. Such regulations were obviously subject to any other provision of law, whether State or federal, including allowance for "reasonable variations."

There was no conflict between



the federal law and the State statute and regulations.

This rationale would apply to the General Mills case as well as to the Rath case.

B

THE STATE IS FREE TO  
REGULATE PRODUCTS WHICH  
NO LONGER ARE IN  
INTERSTATE COMMERCE

The Court of Appeals made much ado of 21 USC, §678, which, at first glance, would seem to prohibit the enactment of requirements by a State which are "in addition to, or different than those made under this act," and "marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this act."

The above language of 21 USC, §678, applies "with respect to premises, facilities and operations of any establishment at which inspection is provided under subch. I." Subch. I includes 21 USC, §§201-624.

First, in enacting the WMA, Congress was concerned about "effective regulation of meat and meat products in interstate or foreign commerce,\*\*\* and (that) regulation by the Secretary and cooperation by the States and other jurisdictions as contemplated by the Act (are) appropriate to prevent and eliminate burdens upon such commerce, to effectively regulate such commerce, and to protect the health and welfare of consumers." 21 USC, §602. (Emphasis added.)

21 USC, §603, reads in part:  
For the purpose of preventing the use in commerce of meat and meat food products which are adulterated, the Secretary shall cause to be made,\*\*\* an examination and inspection of all cattle\*\*\*before they shall be allowed to enter into slaughtering, packing,

meat-canning, rendering, or similar establishment in which they are to be slaughtered.\*\*\*" (Emphasis added.)

21 USC, §606 provides that "\*\*\* the Secretary shall cause to be made, by inspectors appointed for that purpose, an examination and inspection of all meat food products prepared for commerce in any slaughtering, meat-canning, salting, packing, rendering, or similar establishments,\*\*\*" (Emphasis added.)

21 USC, §607(d) provides that "No article subject to this title (21 USC, §§601-624) shall be sold or offered for sale by any person, firm, or corporation, in commerce, under any name or other marking or labeling which is false or misleading,\*\*\*" (Emphasis added.) The qualification that the meat or products be in "commerce"

is repeated in 21 USC, §§608, 609, 610, 619 and 624.

"Commerce" is defined in 21 USC, §601(h), as follows: "The term 'commerce' means commerce between any State, any Territory, or the District of Columbia, and any place outside thereof, or within any Territory not organized with a legislative body, or the District of Columbia."

The conclusion is obvious. The prohibitive language of USC, §678, relied upon by the Court of Appeals in Rath simply does not apply to items which are no longer "in commerce," i.e., those that have left commerce and are awaiting intrastate sale to a vulnerable consumer.

In fact Congress contemplated State activity in this area since in 21 USC, §607, the Secretary of Agri-

culture is mandated to consult with states:

"There shall also be consultation between the Secretary and an appropriate advisory committee provided for in §301 of this Act (21 USC, §661), prior to the issuance of such standards under this Act\*\*\*, to avoid, insofar as feasible, inconsistency between federal and State standards." 21 USC, §607(c). (Emphasis added.)

21 USC, §661, further reflects the congressional view of the authority of a State:

"(a) It is the policy of the Congress to protect the consuming public from meat and meat food products



that are adulterated or misbranded and to assist in efforts by State and other government agencies to accomplish this objective."

Moreover, 21 USC, §661, specifically makes reference to the development by a State of requirements at least equal to those imposed under 21 USC, §§601-624, 671-680, and excludes the Secretary from interference unless such regulations have failed to be developed or enforced by a State. 21 USC, §661(c). The Secretary is otherwise authorized to cooperate with appropriate State agencies in developing and administering State programs under State laws containing authorities at least equal to those provided in (21 USC, §§641-645). 21 USC, §661(a)(2). Small wonder that V. L. Hutchings, USDA Regional

Compliance Officer, testified in the trial court that "we do not normally make a review in the retail stores," and "The government agency (such as County Department of Weights and Measures) which was doing the testing would advise us of (that) difference in weight." (See pages 78, 81 of Petitioner Wallace's brief for Writ of Certiorari in the Rath case.)

The Court of Appeals, in both Rath and General Mills, recognized that the State has the unquestioned right to exercise its police powers in regulation of weights and measures. (General Mills, Slip opinion, pp. 41, 50), and that California is free to enact "other" statutes and regulations which do not offend §678 (21 USC). (Rath, Slip opinion p. 29). What the Court of Appeals failed to recognize

was that the police power of the state, historically and presently recognized, Swift & Co. vs. Wickham, 230 Fed. Supp. 398, 402-403, appeal dismissed, 382 U.S. 111 (1965); Savage vs. Jones, 225 U.S. 501 (1912); Sligh vs. Kirkwood, 237 U.S. 52 (1915) was not infringed upon by the Congressional enactments of the WMA, FDCA and FPLA because such acts apply to goods and products in interstate commerce and not to goods and products upon which the State exercises primary jurisdiction.<sup>8/</sup>

Both federal and State governments have a role here. Federal regulations would be applicable where a main plant is producing commodities which will

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<sup>8/</sup> See H. P. Hood & Sons vs. DuMond, 336 U.S. 525 (1948).

enter interstate commerce<sup>9/</sup> and State regulations where such commodities come to rest in the supermarkets and grocery shops of the localities in the various States and assume a "local" nature. (See, e.g., Parker vs. Brown, 317 U.S. 341, 360 (1943).) At this point the interests of the State become paramount and the need to protect the particular public becomes urgent.

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<sup>9/</sup> See Michelin Tire Corp. vs. Wages, \_\_\_\_\_ U.S. \_\_\_\_\_, (No. 74-1396) (1975), where taxing by State of goods no longer in import transit was upheld by this Supreme Court.

C

UNCONSTITUTIONAL ACTS OF  
CONGRESS WHICH INFRINGE  
UPON THE RIGHTS OF THE  
STATES ARE REVIEWABLE  
BY THIS COURT

If, in the face of State legislation which protects the local consumer, the federal laws in this area are held to be preemptive, then there exists a serious question of Congressional violation of the Tenth Amendment to the U.S. Constitution which reserves to the States the powers not delegated to the United States. Thus, if, as the Court of Appeals held, and notwithstanding the above argument of Amicus, Congress has enacted provisions which violate the U.S. Constitutions, then, of course, such provisions would be subject to review by this Supreme Court.

McCulloch vs. Maryland, 4 Wheat. (17 U.S.) 316 (1819). One hundred and thirty-six years ago, this Supreme Court chose to plant itself on what it considered these "impregnable positions": "That a State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States. That by virtue of this, it is not only the right, but the obligation and solemn duty of a State, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem conducive to these ends; where the power over the particular subject, or the manner of its exercise is not



surrendered or restrained, in the manner just stated. That all these powers which relate merely to municipal legislation or what may, perhaps, more properly called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a State is complete, unqualified and exclusive." New York vs. Miln, 36 U.S. 102, 139, (1837). (See also Huron Portland Cement Co. vs. Detroit, 362 U.S. 440 (1960), Kelly vs. Washington, 302 U.S. 1 (1937)).

The State of California has been active in protecting its consumers in order to assure that such consumers receive the full value of their dollars in goods and products bought by California retailers. The Appendix attached to this brief, based upon the official

records of the California Department of Weights and Measures, typifies such effort. Seventeen (17) classifications are listed for various commodities that are monitored by the California Bureau of Weights and Measures. Examination of the percentages of packages rejected as short-weighted indicates how extensively does California protect its consuming public. Of particular significance in the compilation are the percentages of rejection in items which have very little or no loss due to moisture. For example, the category of chicken, fresh and frozen, (Appendix, p. 77) shows that between 13.43% to 44.85% of those items inspected between the dates of July of 1972, to September of 1975 were rejected as short-weighted. These are the short-weighted amounts which would have been sold to unsuspecting consumers. A

similar conclusion may be drawn from Appendix, pp. 6,14,22,30,38,56,54,62 and 70 by examining Code 4.04 (canned meat) which would have no loss due to moisture. The rejections in this category between September 1974, to September, 1975, range from 0% to 39.40%. In other words, in the absence of day-to-day State and local regulation, those percentages would be translated to a loss for the consumer.<sup>10/</sup>

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<sup>10/</sup> e.g. In Sacramento County alone, there are presently pending three such consumer fraud cases: People vs. Armour & Co. Inc., (Superior Court No. 252343), People vs. Galileo-Capri Salame, (Superior Court No. 251855), and People vs. Gallo Salami, (Superior Court No. 251856.) In addition, records of the Sacramento County Director of the Agricultural Commission and Sealer of Weights and Measures, W. Leland Brown, indicates that 474 off-sale orders were issued in the County of Sacramento, between the dates of January of 1975 and December 31, 1975, on various products.

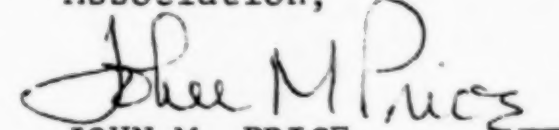
Amicus respectfully suggests that California's efforts to extend to its consuming public the protections heretofore accorded should not be so easily and readily thwarted.

#### CONCLUSION

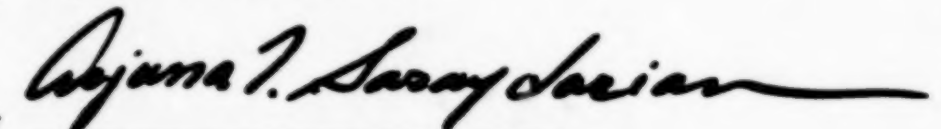
On the basis of the aforementioned reasons, Amicus respectfully prays this Court grant the Petition for Writ of Certiorari to review the judgment and orders of the Court of Appeals of the Ninth Circuit.

Respectfully submitted on behalf of the California District Attorneys

Association,



JOHN M. PRICE  
District Attorney  
County of Sacramento



By  
Arjuna T. Saraydarian  
Deputy District Attorney

Attorneys for Amicus Curiae

## APPENDIX

The attached pages 1 through 77 represent the official compilation by the California Department of Weights and Measures of statistics obtained from each local county department of weights and measures. Thus, the information contained herein represents the activities of local inspectors and the results of such inspection of various commodities from September, 1974, through September, 1975. The last page (77) taken from the same statistics over a longer period of time, is a summary for one item to show the substantial percentage of sub-standard chicken which was rejected throughout the State.



Revised April 22, 1971

COMMODITY CLASSIFICATION LIST INDEX

- 1.00 Confections and Flavorings
- 2.00 Dairy-type products
- 3.00 Bakery goods - fresh, canned or frozen
- 4.00 Meat, fish, poultry
- 5.00 Cooking oils, salad dressings, condiments
- 6.00 Milling products
- 7.00 Produce
- 8.00 Other food preparations
- 9.00 Beverages
- 10.00 Pharmacy products
- 11.00 Garden, farm, pet supplies
- 12.00 Hardware and building materials
- 13.00 Paint and allied products
- 14.00 Maintenance supplies
- 15.00 Paper products
- 16.00 Textile products
- 17.00 Miscellaneous

# COMMUNITY CLASSIFICATIONS LIST INDEX

## 1.00 CONFECTIONS & FLAVORINGS

- 1.01 - Penny Goods
- 1.02 - Par Goods except Sol. Cho. Bars
- 1.03 - Confectionery-type Chocolate
- 1.04 - Chocolate Coatings and Sirups
- 1.05 - Other Flavoring Agents except Cho.
- 1.06 - Packaged Goods except Sol. Cho.
- 1.07 - Bulk Goods except Sol. Cho.
- 1.08 - Salted Nuts and other Conf. Prod.
- 1.09 - Sweetening Sirups and Molasses
- 1.10 - Flavoring Extracts, Ess., other Flavorings
- 1.11 - Salt
- 1.12 - Pepper
- 1.13 - Cane and Beet Sugar Refined
- 1.14 - Herbs and Spices
- 1.15 - Baking Powder & Yeast
- 1.16 - Tenderizers
- 1.40 - Confections & Flavorings, N.E.C.

## 4.00 MEAT, FISH, POULTRY

- 4.01 - Canned Packaged Fish & other Seafood
- 4.02 - Frozen Packaged Fish & other Seafood
- 4.03 - Fresh Packaged Fish & other Seafood
- 4.04 - Canned Meats
- 4.05 - Beef, Fresh & Frozen
- 4.06 - Veal, Fresh & Frozen
- 4.07 - Pork, Fresh & Frozen
- 4.08 - Lamb, Mutton, Fresh & Frozen
- 4.09 - Processed Pork
- 4.10 - Sausage Casings & other Prod. Meats
- 4.11 - Canned Poultry
- 4.12 - Chickens, Fresh & Frozen
- 4.13 - Turkeys, Fresh & Frozen
- 4.14 - Other Poultry & Small Fowl
- 4.40 - Meat, Fish, Poultry, N.E.C.
- 4.70 - Prepackaged Meats (Audits)

## 5.00 COOKING OILS, SALAD DRESSINGS, CONDIMENTS

- 5.01 - Refined Cottonseed Oil
- 5.02 - Cottonseed Cake, Meal, Other By-Products
- 5.03 - Soybean Oil
- 5.04 - Other Vegetable Oils
- 5.05 - Other Vegetable Oil Products
- 5.06 - Animal & Marine Oil Products
- 5.07 - Shortening and Cooking Oils
- 5.08 - Salad Dressings, Mayonnaise, Sand. Spreads
- 5.09 - Meat Sauces
- 5.10 - Vinegar and Cider
- 5.40 - Cooking Oils, Salad Dress. Condiments, N.E.C.

## 6.00 MILLING PRODUCTS

- 6.01 - Cereals, Breakfast Foods
- 6.02 - Wheat Flour and Milling
- 6.03 - Corn Meal
- 6.04 - Wet Corn Meal
- 6.05 - Milled Rice and By-Products
- 6.06 - Prepared Flour and Flour Mixes
- 6.07 - Grain Mill Products, N.E.C.
- 6.08 - Macaroni and Allied Foods
- 6.09 - Other Food Preparations, N.E.C.
- 6.40 - Milling Products, N.E.C.

## 7.00 PRODUCE

- 7.01 - Dried and Dehydr. Fruits and Vegetables
- 7.02 - Canned Fruits and Vegetables, N.E.C.
- 7.03 - Frozen Fruits and Vegetables
- 7.04 - Fresh Fruit and Vegetables
- 7.05 - Canned Honey & Mushrooms
- 7.06 - Canned Dry Beans
- 7.40 - Produce, N.E.C.
- 7.50 - Prepackaged Fruits & Vegetables, (Audits)

## 2.00 DAIRY-TYPE PRODUCTS

- 2.01 - Evs. Inc. Liq., Dried & Fros.
- 2.02 - Creamery Butter
- 2.03 - Margarine
- 2.04 - Natural Cheese except Cottage Ch.
- 2.05 - Processed Cheese and Rel. Prods.
- 2.06 - Cottage Cheese
- 2.07 - Sour Cream & Yogurts, Inc. Imt.
- 2.08 - Ice Cream and Ices
- 2.09 - Ice Cream Mix & Ice Milk Mix
- 2.10 - Bars, Popsicle, Ice Cream, Ices, Fruit
- 2.11 - Canned & Evaporated Milk
- 2.12 - Dry Milk Prods. & Non-Dairy Cream
- 2.13 - Packaged Milk and Cream
- 2.14 - Buttermilk, Choc. Drink, Other Milk Drinks
- 2.15 - Other Dairy Drinks
- 2.16 - Puddings, Toppings, & Instant Brkfs.
- 2.17 - Dips and Salads
- 2.40 - Dairy-Type Products, N. E. C.

## 3.00 BAKERY GOODS - CANNED, FRESH, OR FROZEN

- 3.01 - Bread and Bread-Type Rolls
- 3.02 - Breading, Crumbs, Croutons, & Dress.
- 3.03 - Soft Cakes
- 3.04 - Pies
- 3.05 - Doughnuts
- 3.06 - Pastries & Cookies
- 3.07 - Sweet Yeast Goods
- 3.08 - Biscuits, Crackers, & Pretzels
- 3.09 - Other Dry Bakery Products
- 3.10 - Chips, Potato, Corn, etc.
- 3.11 - Tortillas & Allied Products
- 3.12 - Sandwiches
- 3.13 - *Wheat Pies*
- 3.40 - Bakery Goods, N.E.C.
- 3.50 - Prepackaged Bakery Goods (Audits)

-2-

## 8.00 OTHER FOOD PREPARATIONS

- 8.01 - Jams, Jellies, & Preserves
- 8.02 - Peanut Butter & F. Butter Mixes
- 8.03 - Honey & Honey Mixes
- 8.04 - Pickles & other Pickle Prods.
- 8.05 - Soup Mixes
- 8.06 - Canned Soups, except Seafood
- 8.07 - Canned Soups, Seafood
- 8.08 - Frozen Soups
- 8.09 - Catsup & other Tomato Sauces
- 8.10 - Canned Baby Food, except Meat
- 8.11 - Other canned specialties
- 8.12 - Desserts, Ready to Mix
- 8.40 - Other Food preparations, N.E.C.

## 9.00 BEVERAGES

- 9.01 - Malt Liquors & Brewing By-Products
- 9.02 - Wine, Brandy, & Potable Spirits
- 9.03 - Bottled Liquors
- 9.04 - Pack. Ready-to-Serve Mixed Dr.
- 9.05 - Packaged Soft Drinks
- 9.06 - Flavoring Sirups, Soft Drinks
- 9.07 - Beverage Bases except Sirups, Concentrated Juices
- 9.08 - Frozen Fruit Juices and Aides
- 9.09 - Canned or Bottled Fruit Juices
- 9.10 - Roasted Coffee, Whole Bean or Ground
- 9.11 - Concentrated Coffee
- 9.12 - Coffee Substitutes
- 9.13 - Tea, Leaf Form
- 9.14 - Concentrated Tea
- 9.15 - Canned or Bottled Veg. Juices
- 9.16 - Canned or Bottled Water
- 9.17 - Choc. & Cocoa Prods. not Confect.
- 9.18 - Manufactured Ice
- 9.40 - Beverages, N.E.C.

## 10.00 PHARMACY PRODUCTS

- 10.01 - Prescription Drugs
- 10.02 - Pack. Medications, N.E.C.
- 10.03 - Internal Analgesics
- 10.04 - Ext. Analgesics & Antiseptics
- 10.05 - Cough & Cold Remedies
- 10.06 - Laxatives
- 10.07 - Vitamins
- 10.08 - Dentifrices, Inc. Mouthw., Garg., Rinses
- 10.09 - Shaving Preparations
- 10.10 - Razor Blades & Razors not electric
- 10.11 - Perfumes, Toilet Water, Colognes
- 10.12 - Other Cosmetic & Toilet Prep.
- 10.13 - Hair Prep., Inc. Shampoos
- 10.14 - Baby Powder
- 10.15 - Baby Oils and Lotion
- 10.16 - Medical Adhesive Tape
- 10.17 - Adhesive Bandages & Compresses
- 10.18 - Cotton, Medical
- 10.19 - Devices, Medical
- 10.40 - Pharmacy Products, N.E.C.

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## 11.00 GARDEN, FARM, PET SUPPLIES

- 11.01 - Charcoal
- 11.02 - Hickory & other Wood Chips
- 11.03 - A-B-Q Starters & Matches
- 11.04 - Firewood & Kindling
- 11.05 - Household Insecticides & Repellents
- 11.06 - Economic Poisons, N.E.C.
- 11.07 - Superphosphate & Phosphatic Fert.
- 11.08 - Mixed Fert., Fert. of Organic Origin
- 11.09 - Peat Moss, Bark, Mulches, Soil Cond.
- 11.10 - Poultry Feeds
- 11.11 - Livestock Feeds, Inc. Salt Licks
- 11.12 - Dog and Cat Foods
- 11.13 - Other Prepared Animal Feeds
- 11.14 - Pet & Animal Supplies, N.E.C.
- 11.15 - Vegetable & Agricultural Seeds
- 11.16 - Flower Seeds, Bulbs, Plants & Sup.
- 11.17 - Rock, Sand, & Gravel
- 11.18 - Garden Tools & Related Products
- 11.40 - Garden, Farm, Pet Supplies, N.E.C.

## 12.00 HARDWARE AND BUILDING MATERIALS

- 12.01 - Nails, Tacks, Brads, & Rivets
- 12.02 - Bolts, Nuts, Washers, & Screws
- 12.03 - Furniture Hardware
- 12.04 - Builders Hardware
- 12.05 - Other Hardware
- 12.06 - Electrical Equip. & Supplies
- 12.07 - Plumbing Equip. & Supplies
- 12.08 - Tile & Tile Supplies
- 12.09 - Lime & Fireclay
- 12.10 - Cement, Stucco, Plaster, & Terr. Color
- 12.11 - Dry Mortar & Concrete Mix
- 12.12 - Flooring Prods., except Rugs & Lin.
- 12.13 - Linoleum
- 12.14 - Door & Windows
- 12.15 - Moulding & Lumber
- 12.16 - Sheeting Panels, Paneling, & Wall-board
- 12.17 - Building Paper, Felt, & Plastic Coverings
- 12.18 - Starter Rolls, Rolled Roofing, Composition Shingles
- 12.19 - Wood Shingles, Shakes, & Accessory Supplies
- 12.20 - Metal Roofing Products
- 12.21 - Fiberglass Roofing, Sheets, & Rolls
- 12.22 - Wire Products, Fencing, Posts, & Flashings
- 12.40 - Hardware & Building Materials, N.E.C.



## 13.00 PAINT AND ALLIED PRODUCTS

- 13.01 - Int. & Ext. Oil-Type Paints, Including Tint Bases
- 13.02 - Int. & Ext. Water-Type Paint, Including Tint Bases
- 13.03 - Lacquers
- 13.04 - Varnish & Waxes & Varnishes
- 13.05 - Wood Stains
- 13.06 - Rust Preventatives & Solvents
- 13.07 - Wood Preservatives
- 13.08 - Putty, Fillers, Caulking Comp., Allied Prods.
- 13.09 - Glues, Adhesives, Glines
- 13.10 - Adhesive Tapes, N.E.C.
- 13.11 - Linseed Oil
- 13.12 - Softwood Distillation Prods.
- 13.13 - Other Gum & Wood Chemicals
- 13.14 - Wallpaper
- 13.15 - Painters' Equip. & Supplies
- 13.40 - Paint & Allied Products, N.E.C.

## 14.00 MAINTENANCE SUPPLIES

- 14.01 - Bleaches and Bleaching
- 14.02 - Starch
- 14.03 - Packaged Soap
- 14.04 - Packaged Synthetic Organic Deterg.
- 14.05 - Alkaline Deterg. & Acid-Type Cleaners
- 14.06 - Specialty Cleaning & Maint. Prods.
- 14.07 - Polishing Prep. & Related Prods.
- 14.08 - Glycerine
- 14.09 - Dyes
- 14.10 - Sawdust & Shavings
- 14.11 - Oil or Grease Absorbents
- 14.12 - Bays, Charcoals, Polishing Cloths
- 14.13 - Swimming Pool Equip. & Supplies
- 14.40 - Maintenance Supplies, N.E.C.

## 15.00 PAPER PRODUCTS

- 15.01 - Grocers, Variety, Paper Bags
- 15.02 - Specialty Bags & Liners
- 15.03 - Wrapping Prods., Gift Wrap, Ribbon
- 15.04 - Cordage & Twine
- 15.05 - Adhesive & Pressure-Sens. Tapes
- 15.06 - Party Favors, Supp., Novelties, & Dec.
- 15.07 - Paper Bedding, Towels & Wash Cloths, Table Covers & Linens, Wearing Apparel
- 15.08 - Sanitary Food Cont. & Pic. Supp.
- 15.09 - Sanitary Napkins & Tissues
- 15.10 - Paper Towels, Toilet & Tissue Prods.
- 15.11 - Foil & Plastic Wraps
- 15.12 - Oiled, Waxed & Wax Laminated Paper
- 15.13 - Stationery, Envs., Toilets, Sch. & Off. Supplies, Related Products
- 15.14 - Photographic Film & Paper
- 15.15 - Artists Materials & Supplies
- 15.40 - Paper Products, N.E.C.

## 16.00 TEXTILE PRODUCTS

- 16.01 - Bedspreads & Bed Sets
- 16.02 - Sheets & Pillow Cases
- 16.03 - Towels & Wash Cloths
- 16.04 - Table Covers & Linens
- 16.05 - Curtains & Draperies
- 16.06 - Carpets & Rugs
- 16.07 - Carpet & Rug Padding
- 16.08 - Apparel
- 16.09 - Yarns, Threads, Felt, Roll, or Pk.
- 16.10 - Thread & Yarn, Sewing, Darning, Mending, Knitting, Crocheting, Tatting, Hand-Knitting, Embroidery
- 16.11 - Needles, Pins, Fasteners, Similar Notions
- 16.12 - Buttons & Parts, except of precious metals
- 16.13 - Zippers & Slide Fasteners
- 16.14 - A.I. Sewing Threads, Twines, Yarn
- 16.15 - Upholstery Supplies
- 16.16 - Sleeping Bags
- 16.17 - Tents & Tarps
- 16.40 - Textile Products, N.E.C.

## 17.00 MISCELLANEOUS

- 17.01 - Cigarettes
- 17.02 - Cigars
- 17.03 - Chewing, Smoking Tobacco, Snuff
- 17.04 - Other Smoking Equip. & Supplies
- 17.05 - Fishing Tackle & Equipment
- 17.06 - Firearms, Hunting Equip. & Supplies
- 17.07 - Other Sporting & Athletic Goods
- 17.08 - Explosives, Fireworks & Supplies
- 17.09 - Toys & Children's Items
- 17.10 - Hobby, Handicraft Equip. & Supplies
- 17.11 - Soldering Equip. & Supplies
- 17.12 - Welding Equipment & Supplies
- 17.13 - Tools, Shop Equip. & Supplies
- 17.14 - Extinguishers, Safety Prods. & Supp.
- 17.15 - Chemicals, General N.E.C.
- 17.16 - Pressurized Gases
- 17.17 - Automatic Transmission Fluids & Motor Oil
- 17.18 - Lubricating Oils, N.E.C.
- 17.19 - Lubricating Greases
- 17.20 - Brake Fluid
- 17.21 - Antifreeze
- 17.22 - Automotive Window Washer Cleaners
- 17.23 - Transportation Equip. Hardware
- 17.24 - Automotive Products, N.E.C.
- 17.40 - Miscellaneous, N.E.C.

N.E.C. - Not elsewhere Classified  
Sol. Cho. - Solid Chocolate

DIVISION OF MEASUREMENT STANDARDS  
QUANTITY CONTROL  
SUB-CATEGORIES AND % DEFECTIVE REPORT  
September, 1974

CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
<b>1.00 CONFECTIONS AND FLAVORINGS</b>						
1.01	5	0	0%	182	0	0%
1.02	43	2	4.65%	3,916	178	4.55%
1.03	19	1	5.26%	4,374	25	.57%
1.04	0	0	0%	0	0	0%
1.05	0	0	0%	0	0	0%
1.06	139	4	2.88%	11,106	172	1.55%
1.07	12	0	0%	177	0	0%
1.08	264	4	1.52%	5,735	95	1.66%
1.09	0	0	0%	0	0	0%
1.10	0	0	0%	0	0	0%
1.11	47	2	4.26%	2,539	46	1.81%
1.12	0	0	0%	0	0	0%
1.13	172	4	2.33%	17,596	1,400	7.96%
1.14	504	23	4.56%	99,675	810	.81%
1.15	14	1	7.14%	656	19	2.90%
1.16	0	0	0%	0	0	0%
1.40	0	0	0%	0	0	0%
<b>TOTAL</b>	<b>1,219</b>	<b>41</b>	<b>3.36%</b>	<b>145,956</b>	<b>2,745</b>	<b>1.88%</b>
<b>2.00 DAIRY-TYPE PRODUCTS</b>						
2.01	0	0	0%	0	0	0%
2.02	23	3	13.04%	1,273	279	21.92%
2.03	22	2	9.09%	1,272	233	18.32%
2.04	37	0	0%	1,201	0	0%
2.05	134	4	2.99%	14,896	256	1.72%
2.06	5	5	100.00%	501	501	100.00%
2.07	14	1	7.14%	1,000	821	82.10%
2.08	0	0	0%	0	0	0%
2.09	0	0	0%	0	0	0%
2.10	0	0	0%	0	0	0%
2.11	0	0	0%	0	0	0%
2.12	4	4	100.00%	1,422	1,422	100.00%
2.13	322	22	6.83%	103,617	3,584	3.46%
2.14	9	2	22.22%	434	60	13.82%
2.15	2	1	50.00%	67	27	40.30%
2.16	20	0	0%	268	0	0%
2.17	21	0	0%	749	0	0%
2.40	2	0	0%	1,567	0	0%
2.50	822	23	2.80%	164,305	3,411	2.08%
<b>TOTAL</b>	<b>1,437</b>	<b>67</b>	<b>4.66%</b>	<b>292,572</b>	<b>10,594</b>	<b>3.62%</b>
<b>3.00 BAKERY GOODS - FRESH, CANNED OR FROZEN</b>						
3.01	315	33	10.48%	5,816	324	5.57%



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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
3.02	6	0	0%	70	0	0%
3.03	16	5	31.25%	156	56	35.90%
3.04	16	4	25.00%	222	43	19.37%
3.05	3	3	100.00%	5,208	5,208	100.00%
3.06	87	14	16.09%	2,921	731	25.03%
3.07	0	0	0%	0	0	0%
3.08	147	0	0%	3,110	0	0%
3.09	0	0	0%	0	0	0%
3.10	5	0	0%	478	0	0%
3.11	99	13	13.13%	5,189	309	5.95%
3.12	0	0	0%	0	0	0%
3.13	0	0	0%	0	0	0%
3.40	4	0	0%	66	0	0%
3.50	1,500	79	5.27%	231,841	8,243	3.56%
TOTAL	2,198	151	6.87%	255,077	14,914	5.85%

4.00 MEAT, FISH, POULTRY

4.01	7	2	28.57%	196	31	15.82%
4.02	23	1	4.35%	524	26	4.96%
4.03	9	5	55.56%	126	30	23.81%
4.04	0	0	0%	2,749	1	.04%
4.05	0	0	0%	1,765	124	7.14%
4.06	0	0	0%	923	6	.65%
4.07	0	0	0%	10	8	80.00%
4.08	0	0	0%	30	0	0%
4.09	0	0	0%	10,200	2,157	21.15%
4.10	0	0	0%	10,445	726	6.95%
4.11	0	0	0%	152	0	0%
4.12	0	0	0%	3,460	281	8.12%
4.13	0	0	0%	163	11	6.75%
4.14	0	0	0%	58	1	1.72%
4.40	0	0	0%	32	32	100.00%
4.50	0	0	0%	741,915	4,989	.67%
TOTAL	39	8	20.51%	772,747	8,425	1.09%

5.00 COOKING OILS, SALAD DRESSINGS, CONDIMENTES

5.01	0	0	0%	0	0	0%
5.02	0	0	0%	0	0	0%
5.03	0	0	0%	0	0	0%
5.04	0	0	0%	0	0	0%
5.05	0	0	0%	0	0	0%
5.06	0	0	0%	0	0	0%
5.07	0	0	0%	0	0	0%
5.08	15	6	40.00%	2,223	107	4.81%
5.09	0	0	0%	0	0	0%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
5.10	2	0	0%	16,200	0	0%
5.40	19	1	5.26%	4,271	60	1.40%
TOTAL	36	7	19.44%	22,694	167	.74%
6.00 MILLING PRODUCTS						
6.01	12	0	0%	658	0	0%
6.02	0	0	0%	0	0	0%
6.03	0	0	0%	35	20	57.14%
6.04	0	0	0%	34	34	100.00%
6.05	107	5	4.67%	5,963	57	.96%
6.06	0	0	0%	4,707	1,000	21.24%
6.07	87	2	2.30%	1,855	574	30.94%
6.08	102	5	4.90%	6,001	126	2.10%
6.09	3	2	66.67%	48	28	58.33%
6.40	75	2	2.67%	1,332	18	1.35%
TOTAL	386	16	4.15%	20,633	1,857	9.00%

7.00 PRODUCE

7.01	186	12	6.45%	40,126	1,712	4.27%
7.02	95	3	3.15%	261,941	201	.08%
7.03	31	1	3.23%	1,840	56	3.04%
7.04	259	27	10.42%	163,457	5,200	3.18%
7.05	2	0	0%	58	0	0%
7.06	117	1	.85%	4,258	52	1.22%
7.40	12	2	16.67%	584	4	.68%
7.50	238	4	1.68%	35,632	66	.19%
TOTAL	940	50	5.32%	507,896	7,291	1.44%

8.00 OTHER FOOD PREPARATIONS

8.01	5	0	0%	63	0	0%
8.02	0	0	0%	0	0	0%
8.03	22	1	4.55%	147	9	6.12%
8.04	0	0	0%	0	0	0%
8.05	4	0	0%	244	0	0%
8.06	0	0	0%	0	0	0%
8.07	0	0	0%	0	0	0%
8.08	0	0	0%	0	0	0%
8.09	11	3	27.27%	27,189	154	.57%
8.10	0	0	0%	0	0	0%
8.11	0	0	0%	0	0	0%
8.12	14	0	0%	683	0	0%
8.40	193	2	1.01%	5,947	12	.20%
TOTAL	254	6	2.36%	34,273	175	.51%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
<u>9.00 BEVERAGES</u>						
9.01	0	0	0%	0	0	0%
9.02	0	0	0%	0	0	0%
9.03	0	0	0%	0	0	0%
9.04	0	0	0%	0	0	0%
9.05	118	4	3.39%	187,458	84,734	45.20%
9.06	9	3	33.33%	1,226	428	34.91%
9.07	11	0	0%	2,000	0	0%
9.08	0	0	0%	0	0	0%
9.09	33	2	6.06%	77,459	53	.07%
9.10	0	0	0%	0	0	0%
9.11	1	0	0%	12	0	0%
9.12	1	0	0%	12	0	0%
9.13	0	0	0%	0	0	0%
9.14	0	0	0%	0	0	0%
9.15	0	0	0%	0	0	0%
9.16	7	0	0%	965	0	0%
9.17	0	0	0%	0	0	0%
9.18	15	1	6.67%	6,146	120	1.95%
9.40	11	0	0%	1,604	0	0%
TOTAL	206	10	4.85%	276,882	85,335	30.82%

10.00 PHARMACY PRODUCTS

CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
10.01	0	0	0%	0	0	0%
10.02	0	0	0%	0	0	0%
10.03	3	0	0%	22	0	0%
10.04	0	0	0%	0	0	0%
10.05	0	0	0%	0	0	0%
10.06	0	0	0%	0	0	0%
10.07	32	0	0%	8,283	0	0%
10.08	7	0	0%	518	0	0%
10.09	0	0	0%	0	0	0%
10.10	0	0	0%	0	0	0%
10.11	10	0	0%	2,000	0	0%
10.12	110	1	.91%	21,676	2,136	9.85%
10.13	52	1	1.92%	10,292	1,549	15.05%
10.14	0	0	0%	0	0	0%
10.15	0	0	0%	0	0	0%
10.16	0	0	0%	0	0	0%
10.17	0	0	0%	0	0	0%
10.18	0	0	0%	0	0	0%
10.19	0	0	0%	0	0	0%
10.40	14	1	7.14%	2,924	360	12.31%
TOTAL	228	3	1.32%	45,715	4,045	8.85%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
<u>11.00 GARDEN, FARM, PET SUPPLIES</u>						
11.01	13	12	92.31%	531	504	94.92%
11.02	0	0	0%	0	0	0%
11.03	9	4	44.45%	13,266	324	2.44%
11.04	1	1	100.00%	5	5	100.00%
11.05	87	7	8.05%	8,453	505	5.97%
11.06	2	0	0%	350	0	0%
11.07	147	10	6.80%	24,306	127	.52%
11.08	171	2	1.17%	8,361	253	3.03%
11.09	41	1	2.44%	1,958	18	.92%
11.10	94	36	38.30%	4,443	1,261	28.38%
11.11	42	9	21.43%	2,670	640	23.97%
11.12	47	7	14.89%	5,019	315	6.28%
11.13	29	5	17.24%	561	108	19.25%
11.14	19	0	0%	1,658	0	0%
11.15	14	0	0%	346	0	0%
11.16	6	0	0%	128	0	0%
11.17	108	0	0%	19,572	0	0%
11.18	0	0	0%	0	0	0%
11.40	9	1	11.11%	117	18	15.38%
TOTAL	839	95	11.32%	91,744	4,078	4.44%

12.00 HARDWARE AND BUILDING MATERIALS

CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
12.01	95	6	6.32%	4,857	244	5.02%
12.02	18	0	0%	162	0	0%
12.03	0	0	0%	0	0	0%
12.04	0	0	0%	0	0	0%
12.05	0	0	0%	0	0	0%
12.06	33	1	3.03%	3,246	97	2.97%
12.07	6	0	0%	54	0	0%
12.08	0	0	0%	0	0	0%
12.09	16	2	12.50%	1,001	41	4.10%
12.10	105	15	14.29%	10,533	595	5.65%
12.11	5	2	40.00%	330	150	45.45%
12.12	0	0	0%	0	0	0%
12.13	0	0	0%	0	0	0%
12.14	0	0	0%	0	0	0%
12.15	0	0	0%	0	0	0%
12.16	0	0	0%	0	0	0%
12.17	3	0	0%	385	0	0%
12.18	0	0	0%	0	0	0%
12.19	0	0	0%	0	0	0%
12.20	0	0	0%	0	0	0%
12.21	0	0	0%	0	0	0%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
12.22	8	0	0%	600	0	0%
12.40	13	0	0%	1,467	0	0%
TOTAL	302	26	8.61%	22,635	1,127	4.98%
<u>13.00 PAINT AND ALLIED PRODUCTS</u>						
13.01	386	3	.78%	33,703	2,118	6.28%
13.02	51	1	1.96%	3,709	102	2.75%
13.03	0	0	0%	0	0	0%
13.04	27	0	0%	2,900	0	0%
13.05	25	0	0%	2,520	0	0%
13.06	4	0	0%	200	0	0%
13.07	0	0	0%	0	0	0%
13.08	15	0	0%	1,442	0	0%
13.09	108	7	6.48%	11,878	3,477	29.02%
13.10	0	0	0%	0	0	0%
13.11	0	0	0%	0	0	0%
13.12	0	0	0%	0	0	0%
13.13	24	0	0%	600	0	0%
13.14	0	0	0%	0	0	0%
13.15	0	0	0%	0	0	0%
13.40	7	0	0%	63	0	0%
TOTAL	647	11	1.70%	57,015	5,697	9.99%
<u>14.00 MAINTENANCE SUPPLIES</u>						
14.01	0	0	0%	0	0	0%
14.02	0	0	0%	0	0	0%
14.03	37	1	2.70%	3,295	28	.85%
14.04	11	1	9.09%	265	15	5.66%
14.05	7	1	14.29%	217	20	9.22%
14.06	60	4	6.67%	6,555	108	1.65%
14.07	19	1	5.26%	1,483	14	.94%
14.08	0	0	0%	0	0	0%
14.09	12	0	0%	460	0	0%
14.10	0	0	0%	0	0	0%
14.11	0	0	0%	0	0	0%
14.12	0	0	0%	0	0	0%
14.13	1	0	0%	11	0	0%
14.40	24	1	4.17%	6,615	120	1.81%
TOTAL	171	9	5.26%	18,901	305	1.61%
<u>15.00 PAPER PRODUCTS</u>						
15.01	16	1	6.25%	823	16	1.94%
15.02	24	9	37.50%	50,073	48,008	95.88%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
15.03	0	0	0%	0	0	0%
15.04	0	0	0%	0	0	0%
15.05	0	0	0%	0	0	0%
15.06	2	0	0%	64	0	0%
15.07	0	0	0%	0	0	0%
15.08	95	1	1.05%	11,004	600	5.45%
15.09	8	0	0%	351	0	0%
15.10	0	0	0%	0	0	0%
15.11	0	0	0%	0	0	0%
15.12	4	0	0%	337	0	0%
15.13	37	3	8.11%	5,431	31	.57%
15.14	0	0	0%	0	0	0%
15.15	29	0	0%	6,412	0	0%
15.40	5	0	0%	800	0	0%
TOTAL	220	14	6.36%	75,295	48,655	64.62%
<u>16.00 TEXTILE PRODUCTS</u>						
16.01	0	0	0%	0	0	0%
16.02	0	0	0%	0	0	0%
16.03	0	0	0%	0	0	0%
16.04	0	0	0%	0	0	0%
16.05	0	0	0%	0	0	0%
16.06	0	0	0%	0	0	0%
16.07	0	0	0%	0	0	0%
16.08	0	0	0%	0	0	0%
16.09	0	0	0%	0	0	0%
16.10	158	12	7.59%	6,627	3,148	47.50%
16.11	0	0	0%	0	0	0%
16.12	0	0	0%	0	0	0%
16.13	0	0	0%	0	0	0%
16.14	0	0	0%	0	0	0%
16.15	0	0	0%	0	0	0%
16.16	0	0	0%	0	0	0%
16.17	4	4	100.00%	122	122	100.00%
16.40	0	0	0%	0	0	0%
TOTAL	162	16	9.88%	6,749	3,270	48.45%
<u>17.00 MISCELLANEOUS</u>						
17.01	6	0	0%	236	0	0%
17.02	0	0	0%	0	0	0%
17.03	8	0	0%	54	0	0%
17.04	0	0	0%	0	0	0%
17.05	0	0	0%	0	0	0%
17.06	9	0	0%	153	0	0%



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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
17.07	0	0	0%	0	0	0%
17.08	0	0	0%	0	0	0%
17.09	1	0	0%	45	0	0%
17.10	38	0	0%	1,500	0	0%
17.11	4	0	0%	365	0	0%
17.12	0	0	0%	0	0	0%
17.13	0	0	0%	0	0	0%
17.14	0	0	0%	0	0	0%
17.15	2	1	50.00%	596	96	16.11%
17.16	0	0	0%	0	0	0%
17.17	47	10	21.28%	58,028	11,153	19.22%
17.18	0	0	0%	0	0	0%
17.19	1	0	0%	2,268	0	0%
17.20	0	0	0%	0	0	0%
17.21	0	0	0%	0	0	0%
17.22	2	2	100.00%	10,991	10,991	100.00%
17.23	12	0	0%	734	0	0%
17.24	23	3	13.04%	18,916	16,128	85.26%
17.40	49	2	4.08%	9,119	2,268	24.87%
TOTAL	202	18	8.91%	104,005	40,636	39.07%
ALL CATEGORIES						
TOTAL	9,486	48	5.78%	2,750,789	239,316	8.70%

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SUB-CATEGORIES AND % DEFECTIVE REPORT  
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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
1.00 CONFECTIONS AND FLAVORINGS						
1.01	3	0	0%	2,084	0	0%
1.02	39	1	2.56%	2,203	30	1.36%
1.03	19	6	31.58%	497	114	22.94%
1.04	0	0	0%	0	0	0%
1.05	0	0	0%	0	0	0%
1.06	475	26	5.47%	52,973	10,215	19.28%
1.07	0	0	0%	0	0	0%
1.08	75	3	4.00%	15,158	1,073	7.08%
1.09	0	0	0%	0	0	0%
1.10	0	0	0%	0	0	0%
1.11	23	0	0%	5,115	0	0%
1.12	0	0	0%	0	0	0%
1.13	28	0	0%	1,795	0	0%
1.14	77	0	0%	18,110	0	0%
1.15	0	0	0%	0	0	0%
1.16	0	0	0%	0	0	0%
1.40	37	0	0%	828	0	0%
TOTAL	776	36	4.64%	98,763	11,432	11.58%
2.00 DAIRY-TYPE PRODUCTS						
2.01	0	0	0%	0	0	0%
2.02	8	0	0%	13,704	0	0%
2.03	21	4	19.05%	3,853	868	22.53%
2.04	32	1	3.13%	2,598	1	0.04%
2.05	36	4	11.11%	8,388	7,420	88.46%
2.06	2	0	0%	80	0	0%
2.07	0	0	0%	0	0	0%
2.08	0	0	0%	0	0	0%
2.09	5	3	60.00%	8,128	128	1.57%
2.10	0	0	0%	0	0	0%
2.11	0	0	0%	0	0	0%
2.12	0	0	0%	0	0	0%
2.13	231	14	6.06%	15,337	1,153	7.52%
2.14	1	1	100.00%	10	10	100.00%
2.15	2	2	100.00%	29	29	100.00%
2.16	0	0	0%	0	0	0%
2.17	8	0	0%	138	0	0%
2.40	0	0	0%	0	0	0%
2.50	741	22	2.97%	145,884	14,680	10.06%
TOTAL	1,087	51	4.69%	198,319	24,289	12.25%
3.00 BAKERY GOODS - CANNED, FRESH, CANNED OR FROZEN						
3.01	117	6	5.13%	2,197	80	3.64%
3.02	0	0	0%	0	0	0%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
3.03	6	2	33.33%	206	25	12.14%
3.04	6	5	83.33%	81	60	74.07%
3.05	1	1	100.00%	5	5	100.00%
3.06	25	6	24.00%	5,204	180	3.46%
3.07	0	0	0%	0	0	0%
3.08	0	0	0%	0	0	0%
3.09	0	0	0%	0	0	0%
3.10	22	0	0%	10,162	0	0%
3.11	28	4	14.29%	3,040	128	4.21%
3.12	0	0	0%	0	0	0%
3.13	0	0	0%	0	0	0%
3.40	0	0	0%	0	0	0%
3.50	1,658	81	4.89%	162,216	3,708	2.29%
TOTAL	1,863	105	5.64%	183,111	4,186	2.29%

4.00 MEAT, FISH, POULTRY

4.01	8	0	0%	178	0	0%
4.02	5	2	40.00%	1,699	24	1.41%
4.03	13	12	92.31%	129	123	95.35%
4.04	0	0	0%	1,393	0	0%
4.05	0	0	0%	388	266	68.56%
4.06	0	0	0%	0	0	0%
4.07	0	0	0%	7	3	42.86%
4.08	0	0	0%	6	6	100.00%
4.09	0	0	0%	9,857	1,489	15.11%
4.10	0	0	0%	3,992	1,219	30.54%
4.11	0	0	0%	0	0	0%
4.12	0	0	0%	504	314	62.30%
4.13	0	0	0%	408	223	54.66%
4.14	0	0	0%	0	0	0%
4.40	0	0	0%	7	7	100.00%
4.50	0	0	0%	615,137	3,299	.54%
TOTAL	26	14	53.85%	633,705	6,973	1.10%

5.00 COOKING OILS, SALAD DRESSINGS, CONDIMENT

5.01	0	0	0%	0	0	0%
5.02	0	0	0%	0	0	0%
5.03	0	0	0%	0	0	0%
5.04	16	0	0%	571	0	0%
5.05	0	0	0%	0	0	0%
5.06	0	0	0%	0	0	0%
5.07	128	4	3.13%	19,724	609	3.09%
5.08	12	0	0%	761	0	0%
5.09	0	0	0%	0	0	0%
5.10	0	0	0%	0	0	0%
5.40	10	2	20.00%	59	4	6.78%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
TOTAL	166	6	3.61%	21,121	613	2.90%
6.00 MILLING PRODUCTS						
6.01	29	0	0%	3,055	0	0%
6.02	0	0	0%	0	0	0%
6.03	0	0	0%	27	27	100.00%
6.04	0	0	0%	0	0	0%
6.05	10	2	20.00%	320	8	2.50%
6.06	0	0	0%	9,595	170	1.77%
6.07	3	0	0%	355	0	0%
6.08	167	3	1.80%	25,445	50	.20%
6.09	0	0	0%	0	0	0%
6.40	1	1	100.00%	16	16	100.00%
TOTAL	210	6	2.86%	38,853	271	.70%

7.00 PRODUCE

7.01	76	12	15.79%	2,205	558	25.31%
7.02	27	1	3.70%	952	14	1.47%
7.03	0	0	0%	0	0	0%
7.04	154	14	9.09%	16,176	1,490	9.21%
7.05	0	0	0%	0	0	0%
7.06	0	0	0%	0	0	0%
7.40	5	0	0%	190	0	0%
7.50	292	12	4.11%	40,790	521	1.28%
TOTAL	554	39	7.04%	60,313	2,583	4.28%

8.00 OTHER FOOD PREPARATIONS

8.01	0	0	0%	0	0	0%
8.02	0	0	0%	0	0	0%
8.03	6	4	66.67%	145	76	52.41%
8.04	0	0	0%	0	0	0%
8.05	4	0	0%	89	0	0%
8.06	7	0	0%	235	0	0%
8.07	0	0	0%	0	0	0%
8.08	0	0	0%	0	0	0%
8.09	9	1	11.11%	437	15	3.43%
8.10	0	0	0%	0	0	0%
8.11	0	0	0%	0	0	0%
8.12	0	0	0%	0	0	0%
8.40	33	0	0%	586	0	0%
TOTAL	59	5	8.47%	1,492	91	6.10%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
<u>9.00 BEVERAGES</u>						
9.01	0	0	0%	0	0	0%
9.02	0	0	0%	0	0	0%
9.03	0	0	0%	0	0	0%
9.04	0	0	0%	0	0	0%
9.05	83	0	0%	14,280	0	0%
9.06	6	1	16.67%	643	143	22.24%
9.07	20	0	0%	560	0	0%
9.08	0	0	0%	0	0	0%
9.09	0	0	0%	0	0	0%
9.10	13	0	0%	39,858	1	.002%
9.11	4	0	0%	55,365	0	0%
9.12	0	0	0%	0	0	0%
9.13	5	1	20.00%	1,344	144	10.71%
9.14	0	0	0%	0	0	0%
9.15	0	0	0%	0	0	0%
9.16	0	0	0%	0	0	0%
9.17	0	0	0%	0	0	0%
9.18	21	1	4.76%	2,766	234	8.46%
9.40	0	0	0%	0	0	0%
TOTAL	152	3	1.97%	114,816	522	.45%

10.00 PHARMACY PRODUCTS

10.01	0	0	0%	0	0	0%
10.02	0	0	0%	0	0	0%
10.03	0	0	0%	0	0	0%
10.04	4	0	0%	260	0	0%
10.05	0	0	0%	0	0	0%
10.06	0	0	0%	0	0	0%
10.07	5	0	0%	610	0	0%
10.08	0	0	0%	0	0	0%
10.09	0	0	0%	0	0	0%
10.10	1	0	0%	266	0	0%
10.11	76	6	7.89%	3,611	82	2.27%
10.12	11	4	36.36%	130	40	30.77%
10.13	3	1	33.33%	582	382	65.64%
10.14	12	0	0%	134	0	0%
10.15	1	1	100.00%	4	4	100.00%
10.16	0	0	0%	0	0	0%
10.17	7	0	0%	210	0	0%
10.18	0	0	0%	0	0	0%
10.19	3	0	0%	50	0	0%
10.40	0	0	0%	0	0	0%
TOTAL	123	12	9.76%	5,877	508	8.64%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
<u>11.00 GARDEN, FARM, PET SUPPLIES</u>						
11.01	1	0	0%	62	0	0%
11.02	0	0	0%	0	0	0%
11.03	4	0	0%	120	0	0%
11.04	1	0	0%	300	0	0%
11.05	75	5	6.67%	27,148	8,780	32.34%
11.06	13	2	15.38%	615	28	4.55%
11.07	11	1	9.09%	804	9	1.12%
11.08	120	2	1.67%	6,716	21	.31%
11.09	83	9	10.84%	20,603	16,885	81.95%
11.10	53	0	0%	3,382	0	0%
11.11	128	9	7.03%	14,239	684	4.80%
11.12	54	3	.56%	14,275	412	2.89%
11.13	108	5	4.63%	7,100	1,435	20.21%
11.14	51	0	0%	9,887	0	0%
11.15	41	4	9.76%	6,408	104	1.62%
11.16	15	2	13.33%	1,163	48	4.13%
11.17	23	2	8.70%	2,349	325	13.84%
11.18	0	0	0%	0	0	0%
11.40	0	0	0%	0	0	0%
TOTAL	781	44	5.63%	115,161	28,731	24.95%

12.00 HARDWARE AND BUILDING MATERIALS

12.01	13	0	0%	170	0	0%
12.02	3	1	33.33%	96	29	30.21%
12.03	0	0	0%	0	0	0%
12.04	0	0	0%	0	0	0%
12.05	0	0	0%	0	0	0%
12.06	10	2	20.00%	1,203	298	24.77%
12.07	0	0	0%	0	0	0%
12.08	0	0	0%	0	0	0%
12.09	6	2	33.33%	1,058	116	10.96%
12.10	55	2	3.64%	5,072	86	1.70%
12.11	0	0	0%	0	0	0%
12.12	109	16	14.68%	35,286	22,743	64.45%
12.13	0	0	0%	0	0	0%
12.14	0	0	0%	0	0	0%
12.15	0	0	0%	0	0	0%
12.16	0	0	0%	0	0	0%
12.17	8	1	12.50%	3,622	972	26.84%
12.18	0	0	0%	0	0	0%
12.19	0	0	0%	0	0	0%
12.20	0	0	0%	0	0	0%
12.21	0	0	0%	0	0	0%
12.22	14	0	0%	869	0	0%



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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
12.40	18	2	11.11%	2,646	555	20.98%
TOTAL	236	26	11.02%	50,022	24,799	49.58%
13.00 PAINT AND ALLIED PRODUCTS						
13.01	278	3	1.08%	16,299	1,624	9.96%
13.02	17	0	0%	3,300	0	0%
13.03	0	0	0%	0	0	0%
13.04	0	0	0%	0	0	0%
13.05	30	0	0%	2,200	0	0%
13.06	0	0	0%	0	0	0%
13.07	0	0	0%	0	0	0%
13.08	25	2	8.00%	8,024	2,424	30.21%
13.09	83	2	2.41%	9,318	56	.60%
13.10	3	0	0%	629	0	0%
13.11	0	0	0%	0	0	0%
13.12	0	0	0%	0	0	0%
13.13	0	0	0%	0	0	0%
13.14	0	0	0%	0	0	0%
13.15	0	0	0%	0	0	0%
13.40	26	0	0%	2,050	0	0%
TOTAL	462	7	1.52%	41,820	4,104	9.81%

14.00 MAINTENANCE SUPPLIES

14.01	3	0	0%	555	0	0%
14.02	0	0	0%	0	0	0%
14.03	18	0	0%	7,268	0	0%
14.04	0	0	0%	0	0	0%
14.05	2	0	0%	230	0	0%
14.06	63	1	1.59%	7,432	210	2.83%
14.07	27	0	0%	1,748	0	0%
14.08	0	0	0%	0	0	0%
14.09	4	0	0%	675	0	0%
14.10	0	0	0%	0	0	0%
14.11	0	0	0%	0	0	0%
14.12	0	0	0%	0	0	0%
14.13	52	0	0%	7,215	0	0%
14.40	14	1	7.14%	3,516	900	25.60%
TOTAL	183	2	1.09%	28,639	1,110	3.88%

15.00 PAPER PRODUCTS

15.01	7	0	0%	651	0	0%
15.02	12	0	0%	1,200	0	0%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
15.03	0	0	0%	0	0	0%
15.04	0	0	0%	0	0	0%
15.05	0	0	0%	0	0	0%
15.06	24	2	8.33%	2,939	89	3.03%
15.07	1	0	0%	1,000	0	0%
15.08	36	2	66.67%	2,219	21	.95%
15.09	3	0	0%	52	0	0%
15.10	4	0	0%	277	0	0%
15.11	0	0	0%	0	0	0%
15.12	0	0	0%	0	0	0%
15.13	45	2	4.44%	7,479	45	.60%
15.14	0	0	0%	0	0	0%
15.15	0	0	0%	0	0	0%
15.40	1	1	100.00%	205	205	100.00%
TOTAL	133	7	5.26%	16,022	360	2.25%

16.00 TEXTILE PRODUCTS

16.01	0	0	0%	0	0	0%
16.02	0	0	0%	0	0	0%
16.03	0	0	0%	0	0	0%
16.04	0	0	0%	0	0	0%
16.05	24	0	0%	520	0	0%
16.06	0	0	0%	0	0	0%
16.07	0	0	0%	0	0	0%
16.08	0	0	0%	0	0	0%
16.09	0	0	0%	0	0	0%
16.10	185	6	3.24%	15,553	3,763	24.19%
16.11	0	0	0%	0	0	0%
16.12	0	0	0%	0	0	0%
16.13	0	0	0%	0	0	0%
16.14	0	0	0%	0	0	0%
16.15	0	0	0%	0	0	0%
16.16	0	0	0%	0	0	0%
16.17	0	0	0%	0	0	0%
16.40	0	0	0%	0	0	0%
TOTAL	209	6	2.87%	16,073	3,763	23.41%

17.00 MISCELLANEOUS

17.01	0	0	0%	0	0	0%
17.02	0	0	0%	0	0	0%
17.03	12	0	0%	150	0	0%
17.04	0	0	0%	0	0	0%
17.05	0	0	0%	0	0	0%
17.06	0	0	0%	0	0	0%
17.07	0	0	0%	0	0	0%
17.08	0	0	0%	0	0	0%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
17.09	0	0	0%	0	0	0%
17.10	19	2	10.53%	2,897	984	33.97%
17.11	4	0	0%	120	0	0%
17.12	0	0	0%	0	0	0%
17.13	0	0	0%	0	0	0%
17.14	0	0	0%	0	0	0%
17.15	10	3	30.00%	1,494	1,216	81.39%
17.16	8	0	0%	59	0	0%
17.17	32	12	37.50%	44,678	30,689	68.69%
17.18	6	0	0%	1,200	0	0%
17.19	12	0	0%	392	5	1.28%
17.20	0	0	0%	0	0	0%
17.21	0	0	0%	0	0	0%
17.22	0	0	0%	0	0	0%
17.23	0	0	0%	0	0	0%
17.24	7	2	28.58%	5,292	293	5.54%
17.40	36	1	2.78%	3,128	88	2.81%
TOTAL	146	18	12.33%	59,410	33,275	56.01%
ALL CATEGORIES TOTAL	6,566	387	5.89%	1,683,427	147,610	8.77%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
1.00 CONFECTIONS AND FLAVORINGS						
1.01	2	0	0%	25	0	0%
1.02	231	18	7.79%	31,244	9,602	30.73%
1.03	16	2	12.50%	270	13	4.81%
1.04	1	1	100.00%	1,056	1,056	100.00%
1.05	0	0	0%	0	0	0%
1.06	608	24	3.95%	28,318	469	1.66%
1.07	63	0	0%	3,179	0	0%
1.08	117	10	8.55%	3,536	553	15.64%
1.09	0	0	0%	0	0	0%
1.10	0	0	0%	0	0	0%
1.11	21	1	4.76%	1,032	45	4.36%
1.12	17	3	17.65%	519	217	41.81%
1.13	140	3	2.14%	7,871	105	1.33%
1.14	59	4	6.78%	4,280	941	21.99%
1.15	2	1	50.00%	35	15	42.86%
1.16	0	0	0%	0	0	0%
1.40	29	6	20.69%	14,395	8,478	58.90%
TOTAL	1,304	73	5.60%	95,760	21,494	22.45%
2.00 DAIRY-TYPE PRODUCTS						
2.01	4	0	0%	150	0	0%
2.02	22	4	18.18%	2,369	533	22.50%
2.03	28	0	0%	1,376	0	0%
2.04	91	4	4.40%	37,266	24,085	64.63%
2.05	39	4	10.26%	409	67	16.38%
2.06	16	5	31.25%	1,373	28	2.04%
2.07	5	0	0%	628	0	0%
2.08	0	0	0%	0	0	0%
2.09	0	0	0%	0	0	0%
2.10	0	0	0%	0	0	0%
2.11	1	0	0%	222	0	0%
2.12	0	0	0%	0	0	0%
2.13	239	10	4.18%	30,113	1,402	4.66%
2.14	0	0	0%	0	0	0%
2.15	14	4	28.57%	10,262	45	0.44%
2.16	18	1	5.56%	380	6	1.58%
2.17	26	0	0%	487	0	0%
2.40	0	0	0%	0	0	0%
2.50	674	52	7.72%	262,261	60,142	22.93%
TOTAL	1,177	84	7.14%	347,296	86,303	24.85%
3.00 BAKERY GOODS- FRESH, CANNED OR FROZEN						
3.01	445	21	4.72%	10,821	257	2.38%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
3.02	72	3	4.17%	4,789	89	1.86%
3.03	60	7	11.67%	12,631	151	1.19%
3.04	40	11	27.50%	1,690	706	41.78%
3.05	11	1	9.09%	434	39	8.99%
3.06	267	5	1.87%	4,205	383	9.11%
3.07	0	0	0%	0	0	0%
3.08	0	0	0%	0	0	0%
3.09	12	0	0%	180	0	0%
3.10	8	0	0%	42,800	0	0%
3.11	33	6	18.18%	7,472	255	3.41%
3.12	0	0	0%	0	0	0%
3.13	5	0	0%	300	0	0%
3.14	11	0	0%	132	0	0%
3.50	2,441	134	5.49%	103,766	6,247	6.02%
TOTAL	3,405	188	5.52%	189,273	8,127	4.29%

4.00 MEAT, FISH, POULTRY

4.01	140	0	0%	6,045	1	.02%
4.02	20	3	15.00%	425	26	6.12%
4.03	22	13	59.09%	209	105	50.24%
4.04	0	0	0%	931	0	0%
4.05	0	0	0%	2,127	138	6.49%
4.06	0	0	0%	0	0	0%
4.07	0	0	0%	630	480	76.19%
4.08	0	0	0%	7	7	100.00%
4.09	0	0	0%	3,388	409	12.07%
4.10	0	0	0%	8,306	1,205	14.51%
4.11	0	0	0%	0	0	0%
4.12	0	0	0%	1,215	287	23.62%
4.13	0	0	0%	63,743	2,644	4.15%
4.14	0	0	0%	207	2	.97%
4.15	0	0	0%	73	28	38.36%
4.50	0	0	0%	618,974	3,398	.55%
TOTAL	182	14	7.69%	706,285	8,730	1.24%

5.00 COOKING OILS, SALAD DRESSINGS, CONDIMENT

5.01	0	0	0%	0	0	0%
5.02	0	0	0%	0	0	0%
5.03	0	0	0%	0	0	0%
5.04	0	0	0%	0	0	0%
5.05	0	0	0%	0	0	0%
5.06	0	0	0%	0	0	0%
5.07	17	0	0%	2,514	0	0%
5.08	3	0	0%	2,400	0	0%
5.09	1	0	0%	7,200	0	0%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
5.10	9	1	11.11%	853	12	1.41%
5.15	77	1	12.99%	16,207	14	.09%
TOTAL	107	2	1.87%	29,174	26	.09%
6.00 MILLING PRODUCTS						
6.01	58	3	5.17%	1,069	44	4.12%
6.02	0	0	0%	0	0	0%
6.03	0	0	0%	4,866	15	.31%
6.04	0	0	0%	0	0	0%
6.05	9	1	11.11%	419	11	2.63%
6.06	0	0	0%	1,590	132	8.30%
6.07	5	1	20.00%	101	31	30.69%
6.08	391	15	3.84%	52,836	1,425	2.70%
6.09	2	2	100.00%	37	37	100.00%
6.10	33	1	3.03%	599	19	3.17%
TOTAL	498	23	4.62%	61,517	1,714	2.79%

7.00 PRODUCE

7.01	213	18	8.45%	8,511	1,709	20.08%
7.02	54	7	12.96%	145,231	22,891	15.76%
7.03	33	0	0%	4,710	0	0%
7.04	194	19	9.79%	12,532	1,290	10.29%
7.05	7	2	28.57%	257	133	51.75%
7.06	0	0	0%	0	0	0%
7.10	17	4	23.53%	2,041	82	4.02%
7.50	512	18	3.52%	297,898	921	.31%
TOTAL	1,030	68	6.60%	471,180	27,026	5.74%

8.00 OTHER FOOD PREPARATIONS

8.01	24	3	12.50%	470	35	7.45%
8.02	0	0	0%	0	0	0%
8.03	34	7	20.59%	1,136	525	46.21%
8.04	5	0	0%	34	0	0%
8.05	4	0	0%	89	0	0%
8.06	7	0	0%	235	0	0%
8.07	0	0	0%	0	0	0%
8.08	0	0	0%	0	0	0%
8.09	47	2	4.26%	67,273	8,664	12.88%
8.10	0	0	0%	0	0	0%
8.11	1	0	0%	49	0	0%
8.12	0	0	0%	0	0	0%
8.15	131	10	7.63%	12,506	8,214	65.68%
TOTAL	253	22	8.70%	81,812	17,438	21.31%



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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
<u>9.00 BEVERAGES</u>						
9.01	0	0	0%	0	0	0%
9.02	0	0	0%	0	0	0%
9.03	0	0	0%	0	0	0%
9.04	0	0	0%	0	0	0%
9.05	67	0	0%	22,600	0	0%
9.06	0	0	0%	0	0	0%
9.07	0	0	0%	0	0	0%
9.08	0	0	0%	0	0	0%
9.09	1	1	100.00%	120	120	100.00%
9.10	6	0	0%	35,172	23	.07%
9.11	6	0	0%	5,000	0	0%
9.12	0	0	0%	0	0	0%
9.13	0	0	0%	0	0	0%
9.14	0	0	0%	0	0	0%
9.15	0	0	0%	0	0	0%
9.16	0	0	0%	0	0	0%
9.17	1	0	0%	33	0	0%
9.18	8	0	0%	7,665	0	0%
9.40	0	0	0%	0	0	0%
TOTAL	89	1	1.12%	70,590	143	24.24%

10.00 PHARMACY PRODUCTS

CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
10.01	5	1	20.00%	5	1	20.00%
10.02	0	0	0%	0	0	0%
10.03	0	0	0%	0	0	0%
10.04	3	0	0%	900	0	0%
10.05	0	0	0%	0	0	0%
10.06	4	0	0%	47	0	0%
10.07	12	2	16.67%	4,304	1,668	38.75%
10.08	0	0	0%	0	0	0%
10.09	0	0	0%	0	0	0%
10.10	3	0	0%	64	0	0%
10.11	32	0	0%	6,600	0	0%
10.12	96	9	9.38%	37,733	4,933	13.07%
10.13	46	5	10.87%	13,255	855	6.45%
10.14	1	0	0%	300	0	0%
10.15	0	0	0%	0	0	0%
10.16	0	0	0%	0	0	0%
10.17	0	0	0%	0	0	0%
10.18	0	0	0%	0	0	0%
10.19	0	0	0%	0	0	0%
10.40	11	1	9.09%	549	6	1.09%
TOTAL	213	18	8.45%	63,757	7,462	11.70%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
<u>11.00 GARDEN, FARM, PET SUPPLIES</u>						
11.01	15	1	6.67%	2,472	34	1.38%
11.02	0	0	0%	0	0	0%
11.03	0	0	0%	0	0	0%
11.04	3	1	33.33%	30	7	23.33%
11.05	61	20	32.79%	60,131	16,826	27.98%
11.06	17	1	5.88%	773	32	4.14%
11.07	13	0	0%	174	0	0%
11.08	39	0	0%	4,710	0	0%
11.09	44	3	6.82%	1,072	38	3.54%
11.10	42	15	35.71%	2,167	757	34.93%
11.11	60	18	30.00%	4,387	671	15.30%
11.12	241	4	1.66%	26,361	49	.19%
11.13	115	0	0%	10,451	40	.38%
11.14	185	11	5.95%	19,884	1,393	7.01%
11.15	43	7	16.28%	13,670	844	6.17%
11.16	18	0	0%	5,250	0	0%
11.17	13	0	0%	178	0	0%
11.18	0	0	0%	0	0	0%
11.40	5	0	0%	56	0	0%
TOTAL	914	81	8.86%	151,766	20,691	13.63%

12.00 HARDWARE, AND BUILDING MATERIALS

CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
12.01	36	0	0%	23,917	0	0%
12.02	193	1	.52%	60,044	13	.02%
12.03	0	0	0%	0	0	0%
12.04	19	0	0%	3,412	0	0%
12.05	13	0	0%	133	0	0%
12.06	36	3	8.33%	3,272	176	5.38%
12.07	6	0	0%	724	0	0%
12.08	10	1	10.00%	1,400	109	7.79%
12.09	7	0	0%	1,776	0	0%
12.10	65	4	6.15%	5,364	146	2.72%
12.11	5	1	20.00%	132	30	22.73%
12.12	0	0	0%	0	0	0%
12.13	0	0	0%	0	0	0%
12.14	0	0	0%	0	0	0%
12.15	0	0	0%	0	0	0%
12.16	17	0	0%	922	0	0%
12.17	2	2	100.00%	438	438	100.00%
12.18	4	0	0%	241	0	0%
12.19	0	0	0%	0	0	0%
12.20	0	0	0%	0	0	0%
12.21	0	0	0%	0	0	0%
12.22	30	0	0%	745	0	0%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
12.40	47	1	2.13%	6,388	235	3.68%
TOTAL	490	13	2.65%	114,903	1,147	1.00%
13.00 PAINT AND ALLIED PRODUCTS						
13.01	298	1	.34%	16,010	1,260	7.87%
13.02	55	0	0%	2,500	0	0%
13.03	30	0	0%	1,500	0	0%
13.04	0	0	0%	0	0	0%
13.05	14	0	0%	1,001	1	.10%
13.06	12	0	0%	355	0	0%
13.07	0	0	0%	0	0	0%
13.08	6	0	0%	600	0	0%
13.09	88	1	1.14%	5,425	80	1.47%
13.10	0	0	0%	0	0	0%
13.11	0	0	0%	0	0	0%
13.12	0	0	0%	0	0	0%
13.13	1	0	0%	25	0	0%
13.14	0	0	0%	0	0	0%
13.15	0	0	0%	0	0	0%
13.40	10	3	30.00%	4,414	3,402	77.07%
TOTAL	514	5	.97%	31,830	4,743	14.90%

#### 14.00 MAINTENANCE SUPPLIES

14.01	24	0	0%	1,152	0	0%
14.02	0	0	0%	0	0	0%
14.03	248	11	4.44%	25,443	300	1.18%
14.04	212	1	.47%	79,030	41	.05%
14.05	1	0	0%	49	0	0%
14.06	84	5	5.95%	6,122	84	1.37%
14.07	25	0	0%	4,409	0	0%
14.08	15	0	0%	181	0	0%
14.09	133	0	0%	26,163	0	0%
14.10	0	0	0%	0	0	0%
14.11	0	0	0%	0	0	0%
14.12	11	2	18.18%	621	51	8.21%
14.13	0	0	0%	0	0	0%
14.40	99	4	4.04%	19,336	2,016	10.43%
TOTAL	852	23	2.70%	162,506	2,492	1.53%

#### 15.00 PAPER PRODUCTS

15.01	1	0	0%	47	0	0%
15.02	10	1	10.00%	4,300	400	9.30%
15.03	0	0	0%	0	0	0%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
15.04	0	0	0%	0	0	0%
15.05	0	0	0%	0	0	0%
15.06	17	3	17.65%	7,376	3,800	51.52%
15.07	1	0	0%	1,000	0	0%
15.08	0	0	0%	0	0	0%
15.09	0	0	0%	0	0	0%
15.10	18	1	5.56%	506	143	28.26%
15.11	0	0	0%	0	0	0%
15.12	0	0	0%	0	0	0%
15.13	126	5	3.97%	4,260	24	.56%
15.14	1	0	0%	5	0	0%
15.15	0	0	0%	0	0	0%
15.40	20	0	0%	660	0	0%
TOTAL	194	10	5.15%	18,164	4,367	24.04%

#### 16.00 TEXTILE PRODUCTS

16.01	0	0	0%	0	0	0%
16.02	0	0	0%	0	0	0%
16.03	0	0	0%	0	0	0%
16.04	28	0	0%	4,153	0	0%
16.05	0	0	0%	0	0	0%
16.06	0	0	0%	0	0	0%
16.07	12	1	8.33%	603	11	1.82%
16.08	148	0	0%	36,512	0	0%
16.09	42	0	0%	7,104	0	0%
16.10	154	9	5.84%	16,456	2,795	16.98%
16.11	0	0	0%	0	0	0%
16.12	0	0	0%	0	0	0%
16.13	0	0	0%	0	0	0%
16.14	25	3	12.00%	4,754	241	5.07%
16.15	0	0	0%	0	0	0%
16.16	8	0	0%	151	0	0%
16.17	0	0	0%	0	0	0%
16.40	0	0	0%	0	0	0%
TOTAL	417	13	3.12%	69,733	3,047	4.37%

#### 17.00 MISCELLANEOUS

17.01	0	0	0%	0	0	0%
17.02	0	0	0%	0	0	0%
17.03	16	0	0%	450	0	0%
17.04	0	0	0%	0	0	0%
17.05	37	0	0%	800	0	0%
17.06	2	1	50.00%	28	12	42.86%
17.07	1	1	100.00%	2	2	100.00%
17.08	0	0	0%	0	0	0%
17.09	0	0	0%	0	0	0%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
17.10	49	0	0%	4,030	0	0%
17.11	3	0	0%	299	0	0%
17.12	0	0	0%	0	0	0%
17.13	12	0	0%	2,537	0	0%
17.14	0	0	0%	0	0	0%
17.15	0	0	0%	0	0	0%
17.16	3	0	0%	16,576	2	.01%
17.17	70	11	15.71%	93,229	63,258	67.85%
17.18	4	2	50.00%	212	102	48.11%
17.19	16	2	12.50%	1,585	84	5.30%
17.20	8	0	0%	270	0	0%
17.21	17	6	35.29%	25,967	25,169	96.93%
17.22	2	1	50.00%	224	112	50.00%
17.23	0	0	0%	0	0	0%
17.24	31	2	6.45%	7,251	455	6.27%
17.40	14	0	0%	1,265	0	0%
TOTAL	285	26	9.12%	154,745	89,196	57.64%
ALL CATEGORIES						
TOTAL	11,924	664	5.57%	2,820,296	304,151	10.78%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
1.00 CONFECTIONS AND FLAVORINGS						
1.01	11	1	9.09%	194	24	12.37%
1.02	3	0	0%	85	0	0%
1.03	1	0	0%	295	37	12.54%
1.04	2	0	0%	34	0	0%
1.05	0	0	0%	0	0	0%
1.06	429	11	2.56%	42,153	2,888	6.85%
1.07	7	0	0%	302	0	0%
1.08	127	9	7.09%	9,848	347	3.52%
1.09	6	0	0%	1,450	0	0%
1.10	0	0	0%	0	0	0%
1.11	1	1	100.00%	12	12	100.00%
1.12	0	0	0%	0	0	0%
1.13	53	4	7.55%	310,236	111	.04%
1.14	42	0	0%	1,701	0	0%
1.15	1	1	100.00%	41	41	100.00%
1.16	0	0	0%	0	0	0%
1.40	34	8	23.53%	2,355	114	4.84%
TOTAL	717	35	4.88%	368,706	3,574	.97%
2.00 DAIRY-TYPE PRODUCTS						
2.01	0	0	0%	0	0	0%
2.02	33	3	9.09%	910	156	17.14%
2.03	60	0	0%	1,879	0	0%
2.04	48	0	0%	9,109	0	0%
2.05	85	3	3.53%	1,912	25	13.01%
2.06	6	0	0%	1,832	0	0%
2.07	13	1	7.69%	1,671	32	1.92%
2.08	0	0	0%	0	0	0%
2.09	2	0	0%	174	0	0%
2.10	0	0	0%	0	0	0%
2.11	2	0	0%	370	0	0%
2.12	4	0	0%	32	0	0%
2.13	197	8	4.06%	49,528	4,623	9.33%
2.14	0	0	0%	0	0	0%
2.15	2	1	50.00%	23	8	34.78%
2.16	7	0	0%	219	0	0%
2.17	2	0	0%	92	0	0%
2.40	1	1	100.00%	7	7	100.00%
2.50	475	30	6.32%	368,857	117,705	31.91%
TOTAL	937	47	5.02%	436,615	122,556	28.07%
3.00 BAKERY GOODS - FRESH, CANNED OR FROZEN						
3.01	168	4	2.38%	3,117	478	15.34%



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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
3.02	1	0	0%	120	0	0%
3.03	80	12	15.00%	1,491	261	17.51%
3.04	0	0	0%	0	0	0%
3.05	0	0	0%	0	0	0%
3.06	107	16	14.95%	30,903	760	2.46%
3.07	0	0	0%	0	0	0%
3.08	56	0	0%	2,134	0	0%
3.09	3	0	0%	467	0	0%
3.10	0	0	0%	0	0	0%
3.11	41	0	0%	7,274	0	0%
3.12	5	0	0%	68	0	0%
3.13	0	0	0%	0	0	0%
3.40	0	0	0%	0	0	0%
3.50	1,349	70	5.19%	114,027	4,956	4.35%
TOTAL	1,810	102	5.64%	159,601	6,455	4.04%

4.00 MEAT, FISH, POULTRY

4.01	112	3	2.68%	7,217	97	1.34%
4.02	63	25	39.68%	3,250	926	28.49%
4.03	17	15	88.24%	220	168	76.36%
4.04	0	0	0%	1,945	196	10.08%
4.05	0	0	0%	1,533	121	7.89%
4.06	0	0	0%	13	13	100.00%
4.07	0	0	0%	882	737	83.56%
4.08	0	0	0%	0	0	0%
4.09	0	0	0%	2,805	14	.50%
4.10	0	0	0%	11,026	1,178	10.68%
4.11	0	0	0%	0	0	0%
4.12	0	0	0%	805	426	52.92%
4.13	0	0	0%	51,331	1,332	2.59%
4.14	0	0	0%	23	0	0%
4.40	0	0	0%	517	48	9.28%
4.50	0	0	0%	648,351	3,815	.59%
TOTAL	192	43	22.40%	729,918	9,071	1.24%

5.00 COOKING OILS, SALAD DRESSINGS, CONDIMENTES

5.01	0	0	0%	0	0	0%
5.02	0	0	0%	0	0	0%
5.03	0	0	0%	0	0	0%
5.04	6	0	0%	1,400	0	0%
5.05	0	0	0%	0	0	0%
5.06	0	0	0%	0	0	0%
5.07	38	0	0%	3,475	1	.03%
5.08	9	0	0%	2,229	1	.04%
5.09	0	0	0%	0	0	0%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
5.10	8	0	0%	1,084	0	0%
5.40	134	4	2.99%	16,412	40	.24%
TOTAL	195	4	2.05%	24,600	42	.17%
6.00 MILLING PRODUCTS						
6.01	44	0	0%	4,090	0	0%
6.02	0	0	0%	0	0	0%
6.03	0	0	0%	0	0	0%
6.04	0	0	0%	0	0	0%
6.05	39	1	2.56%	1,490	19	1.28%
6.06	0	0	0%	11,548	24	.21%
6.07	0	0	0%	928	28	3.02%
6.08	210	3	1.43%	28,380	45	.16%
6.09	3	0	0%	91	0	0%
6.40	6	2	33.33%	77	27	35.06%
TOTAL	302	6	1.99%	46,604	143	.31%

7.00 PRODUCE

7.01	124	23	18.55%	12,851	931	7.24%
7.02	18	4	22.22%	708	110	15.54%
7.03	90	0	0%	3,241	44	1.36%
7.04	128	12	9.38%	6,867	1,497	21.80%
7.05	0	0	0%	0	0	0%
7.06	0	0	0%	0	0	0%
7.40	13	0	0%	402	0	0%
7.50	395	6	1.52%	120,041	111	.09%
TOTAL	768	45	5.86%	144,110	2,693	1.87%

8.00 OTHER FOOD PREPARATIONS

8.01	54	1	1.85%	15,986	11	.07%
8.02	6	0	0%	2,200	0	0%
8.03	3	0	0%	200	0	0%
8.04	12	0	0%	2,550	0	0%
8.05	10	0	0%	4,100	0	0%
8.06	12	0	0%	248	0	0%
8.07	0	0	0%	0	0	0%
8.08	0	0	0%	0	0	0%
8.09	23	10	43.48%	50,670	26,543	52.38%
8.10	1	0	0%	23	0	0%
8.11	16	0	0%	2,850	0	0%
8.12	0	0	0%	0	0	0%
8.40	368	30	8.15%	8,993	46	.51%
TOTAL	505	41	8.12%	87,810	26,600	30.29%

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<u>9.00 BEVERAGES</u>						
9.01	0	0	0%	0	0	0%
9.02	0	0	0%	0	0	0%
9.03	2	0	0%	100	0	0%
9.04	0	0	0%	0	0	0%
9.05	70	0	0%	40,328	0	0%
9.06	0	0	0%	0	0	0%
9.07	0	0	0%	0	0	0%
9.08	0	0	0%	0	0	0%
9.09	40	0	0%	5,850	0	0%
9.10	12	0	0%	241	0	0%
9.11	22	0	0%	10,007	0	0%
9.12	0	0	0%	0	0	0%
9.13	4	0	0%	299	0	0%
9.14	0	0	0%	0	0	0%
9.15	0	0	0%	0	0	0%
9.16	0	0	0%	0	0	0%
9.17	0	0	0%	0	0	0%
9.18	26	0	0%	6,100	0	0%
9.40	0	0	0%	0	0	0%
TOTAL	176	0	0%	62,925	0	0%

10.00 PHARMACY PRODUCTS

10.01	0	0	0%	0	0	0%
10.02	0	0	0%	0	0	0%
10.03	0	0	0%	0	0	0%
10.04	0	0	0%	0	0	0%
10.05	0	0	0%	0	0	0%
10.06	2	0	0%	48	0	0%
10.07	5	0	0%	3,460	0	0%
10.08	0	0	0%	0	0	0%
10.09	0	0	0%	0	0	0%
10.10	0	0	0%	0	0	0%
10.11	16	0	0%	2,400	0	0%
10.12	116	9	7.76%	34,410	4,833	14.05%
10.13	68	26	38.24%	8,533	2,467	28.91%
10.14	0	0	0%	0	0	0%
10.15	1	0	0%	564	0	0%
10.16	0	0	0%	0	0	0%
10.17	16	0	0%	206	0	0%
10.18	0	0	0%	0	0	0%
10.19	0	0	0%	0	0	0%
10.40	0	0	0%	0	0	0%
TOTAL	224	35	15.63%	49,621	7,300	14.71%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
<u>11.00 GARDEN, FARM, PET SUPPLIES</u>						
11.01	7	0	0%	850	0	0%
11.02	3	0	0%	273	0	0%
11.03	1	0	0%	7,360	0	0%
11.04	3	0	0%	302	0	0%
11.05	36	2	5.56%	27,383	18,240	66.61%
11.06	8	2	25.00%	3,979	34	.85%
11.07	25	8	32.00%	6,588	1,935	29.37%
11.08	22	5	22.73%	5,162	1,468	28.44%
11.09	8	0	0%	1,647	0	0%
11.10	29	9	31.03%	935	349	37.33%
11.11	34	1	2.94%	4,671	120	2.57%
11.12	48	1	2.08%	6,905	17	.25%
11.13	31	0	0%	22,139	0	0%
11.14	69	2	2.90%	13,002	364	2.80%
11.15	0	0	0%	0	0	0%
11.16	5	0	0%	41	0	0%
11.17	50	10	20.00%	7,754	4,142	53.41%
11.18	0	0	0%	0	0	0%
11.40	10	0	0%	315	0	0%
TOTAL	389	40	10.28%	109,306	26,669	24.40%

12.00 HARDWARE, AND BUILDING MATERIALS

12.01	0	0	0%	0	0	0%
12.02	4	0	0%	140	0	0%
12.03	7	3	42.86%	78	15	19.23%
12.04	0	0	0%	0	0	0%
12.05	6	0	0%	277	0	0%
12.06	0	0	0%	0	0	0%
12.07	46	2	4.35%	973	20	2.06%
12.08	32	2	6.25%	1,611	57	3.54%
12.09	4	1	25.00%	460	10	2.17%
12.10	7	0	0%	744	0	0%
12.11	0	0	0%	0	0	0%
12.12	0	0	0%	0	0	0%
12.13	0	0	0%	0	0	0%
12.14	0	0	0%	0	0	0%
12.15	0	0	0%	0	0	0%
12.16	0	0	0%	0	0	0%
12.17	10	5	50.00%	859	268	31.20%
12.18	0	0	0%	0	0	0%
12.19	0	0	0%	0	0	0%
12.20	0	0	0%	0	0	0%
12.21	0	0	0%	0	0	0%
12.22	0	0	0%	0	0	0%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
12.40	81	8	9.88%	5,068	853	16.83%
TOTAL	197	21	10.66%	10,210	1,223	11.98%
13.00 PAINT AND ALLIED PRODUCTS						
13.01	134	13	9.70%	10,164	1,134	11.16%
13.02	37	2	5.41%	3,110	160	5.14%
13.03	0	0	0%	0	0	0%
13.04	5	0	0%	250	0	0%
13.05	12	0	0%	1,200	0	0%
13.06	0	0	0%	0	0	0%
13.07	0	0	0%	0	0	0%
13.08	4	0	0%	225	0	0%
13.09	6	2	33.33%	5,988	2,340	39.08%
13.10	15	2	13.33%	616	16	2.60%
13.11	7	0	0%	121	0	0%
13.12	0	0	0%	0	0	0%
13.13	12	0	0%	3,201	0	0%
13.14	0	0	0%	0	0	0%
13.15	2	2	100.00%	100	100	100.00%
13.40	16	4	25.00%	3,094	1,776	57.40%
TOTAL	250	25	10.00%	28,069	5,526	19.69%

14.00 MAINTENANCE SUPPLIES

14.01	12	0	0%	965	0	0%
14.02	0	0	0%	0	0	0%
14.03	34	11	32.35%	1,183	288	24.34%
14.04	25	1	4.00%	752	32	4.26%
14.05	39	2	5.13%	1,199	40	3.34%
14.06	46	1	2.17%	6,209	6	.10%
14.07	1	1	100.00%	122	122	100.00%
14.08	34	0	0%	769	0	0%
14.09	96	0	0%	25,608	0	0%
14.10	0	0	0%	0	0	0%
14.11	0	0	0%	0	0	0%
14.12	8	0	0%	784	0	0%
14.13	0	0	0%	0	0	0%
14.40	66	5	7.58%	5,424	87	1.60%
TOTAL	361	21	5.82%	43,015	575	1.34%

15.00 PAPER PRODUCTS

15.01	0	0	0%	0	0	0%
15.02	31	1	3.23%	5,940	70	1.18%
15.03	15	1	6.67%	1,547	27	1.75%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
15.04	0	0	0%	0	0	0%
15.05	1	0	0%	12	0	0%
15.06	18	2	11.11%	1,812	718	39.62%
15.07	0	0	0%	0	0	0%
15.08	0	0	0%	0	0	0%
15.09	0	0	0%	0	0	0%
15.10	3	0	0%	253	1	.40%
15.11	0	0	0%	0	0	0%
15.12	0	0	0%	0	0	0%
15.13	24	3	12.50%	3,193	1,175	36.80%
15.14	0	0	0%	0	0	0%
15.15	1	0	0%	3	0	0%
15.40	14	1	7.14%	1,081	16	1.48%
TOTAL	107	8	7.48%	13,841	2,007	14.50%

16.00 TEXTILE PRODUCTS

16.01	1	1	100.00%	29	29	100.00%
16.02	0	0	0%	0	0	0%
16.03	0	0	0%	0	0	0%
16.04	11	1	9.09%	512	10	1.95%
16.05	0	0	0%	0	0	0%
16.06	0	0	0%	0	0	0%
16.07	10	2	20.00%	131	36	27.48%
16.08	274	0	0%	51,612	0	0%
16.09	25	1	4.00%	6,432	30	.47%
16.10	75	1	1.33%	1,123	12	1.07%
16.11	0	0	0%	0	0	0%
16.12	0	0	0%	0	0	0%
16.13	0	0	0%	0	0	0%
16.14	5	2	40.00%	1,913	789	41.24%
16.15	0	0	0%	0	0	0%
16.16	12	0	0%	30	0	0%
16.17	0	0	0%	0	0	0%
16.40	16	0	0%	108	0	0%
TOTAL	429	8	1.86%	61,890	906	1.46%

17.00 MISCELLANEOUS

17.01	0	0	0%	0	0	0%
17.02	0	0	0%	0	0	0%
17.03	42	0	0%	1,800	0	0%
17.04	0	0	0%	0	0	0%
17.05	20	0	0%	388	0	0%
17.06	0	0	0%	0	0	0%
17.07	0	0	0%	0	0	0%
17.08	1	0	0%	3	0	0%
17.09	2	2	100.00%	290	290	100.00%



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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
17.10	4	1	25.00%	593	43	7.25%
17.11	19	4	21.05%	2,613	978	37.43%
17.12	11	7	63.64%	659	347	52.66%
17.13	0	0	0%	0	0	0%
17.14	0	0	0%	0	0	0%
17.15	5	0	0%	400	0	0%
17.16	11	1	9.09%	87	4	4.60%
17.17	9	0	0%	5,966	0	0%
17.18	0	0	0%	0	0	0%
17.19	0	0	0%	0	0	0%
17.20	0	0	0%	0	0	0%
17.21	5	2	40.00%	7,080	6,588	93.05%
17.22	0	0	0%	0	0	0%
17.23	0	0	0%	0	0	0%
17.24	28	4	14.29%	5,284	269	5.09%
17.40	13	3	23.08%	1,487	1,477	99.33%
TOTAL	170	24	14.12%	26,650	9,996	37.51%
ALL CATEGORIES						
TOTAL	7,729	505	6.53%	2,403,491	225,336	9.38%

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SUB-CATEGORIES AND % DEFECTIVE REPORT  
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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
1.00 CONFECTIONS AND FLAVORINGS						
1.01	15	0	0%	1,007	0	0%
1.02	99	0	0%	9,307	0	0%
1.03	46	9	19.57%	12,408	143	1.15%
1.04	0	0	0%	0	0	0%
1.05	4	0	0%	555	0	0%
1.06	226	13	5.75%	27,350	1,375	5.03%
1.07	13	5	38.46%	590	185	31.36%
1.08	164	4	2.44%	41,524	95	.23%
1.09	4	0	0%	83	0	0%
1.10	0	0	0%	0	0	0%
1.11	4	0	0%	194	0	0%
1.12	24	0	0%	2,252	0	0%
1.13	34	3	8.82%	23,410	151	.65%
1.14	108	3	2.78%	16,785	606	3.61%
1.15	4	0	0%	67	0	0%
1.16	0	0	0%	0	0	0%
1.40	30	1	3.33%	2,118	14	.66%
TOTAL	775	38	4.90%	137,650	2,569	1.87%
2.00 DAIRY-TYPE PRODUCTS						
2.01	0	0	0%	0	0	0%
2.02	146	17	11.64%	7,676	411	5.35%
2.03	193	37	19.17%	9,706	2,747	28.30%
2.04	30	1	3.33%	974	8	.82%
2.05	87	27	31.03%	23,140	857	3.70%
2.06	1	0	0%	66	0	0%
2.07	26	1	3.85%	387	23	5.94%
2.08	0	0	0%	0	0	0%
2.09	0	0	0%	0	0	0%
2.10	0	0	0%	0	0	0%
2.11	7	0	0%	700	0	0%
2.12	0	0	0%	0	0	0%
2.13	452	17	3.76%	57,945	4,599	7.94%
2.14	12	2	16.67%	2,967	838	28.24%
2.15	0	0	0%	0	0	0%
2.16	20	0	0%	1,000	0	0%
2.17	18	0	0%	373	0	0%
2.40	0	0	0%	0	0	0%
2.50	833	48	5.76%	194,661	8,329	4.28%
TOTAL	1,825	150	8.22%	299,595	17,812	5.95%
3.00 BAKERY GOODS - FRESH, CANNED OR FROZEN						
3.01	422	27	6.40%	19,711	1,140	5.78%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
3.02	10	0	0%	502	0	0%
3.03	3	1	33.33%	322	250	77.64%
3.04	7	4	57.14%	146	76	52.05%
3.05	0	0	0%	0	0	0%
3.06	94	11	11.70%	91,378	2,318	2.54%
3.07	0	0	0%	0	0	0%
3.08	28	0	0%	99,137	0	0%
3.09	0	0	0%	0	0	0%
3.10	64	3	4.69%	132,758	3,390	2.55%
3.11	96	6	6.25%	9,395	335	3.57%
3.12	1	0	0%	79	0	0%
3.13	0	0	0%	0	0	0%
3.40	5	0	0%	3,796	0	0%
3.50	1,482	97	6.55%	108,551	12,826	11.82%
TOTAL	2,212	149	6.74%	465,775	20,335	4.37%

4.00 MEAT, FISH, POULTRY

4.01	46	1	2.17%	11,155	30	.27%
4.02	16	1	6.25%	1,589	19	1.20%
4.03	15	11	73.33%	98	53	54.08%
4.04	0	0	0%	1,027	30	2.92%
4.05	0	0	0%	6,972	687	9.85%
4.06	0	0	0%	0	0	0%
4.07	0	0	0%	0	0	0%
4.08	0	0	0%	18	15	83.33%
4.09	0	0	0%	4,942	249	5.04%
4.10	0	0	0%	28,140	2,055	7.30%
4.11	0	0	0%	40	0	0%
4.12	0	0	0%	1,165	688	59.06%
4.13	0	0	0%	1,999	15	.75%
4.14	0	0	0%	0	0	0%
4.40	0	0	0%	80	0	0%
4.50	0	0	0%	544,942	3,123	.57%
TOTAL	77	13	16.88%	602,167	6,964	1.16%

5.00 COOKING OILS, SALAD DRESSINGS, CONDIMENTS

5.01	0	0	0%	0	0	0%
5.02	0	0	0%	0	0	0%
5.03	0	0	0%	0	0	0%
5.04	9	0	0%	1,000	0	0%
5.05	1	0	0%	156	0	0%
5.06	0	0	0%	0	0	0%
5.07	11	1	9.09%	1,326	12	.90%
5.08	0	0	0%	0	0	0%
5.09	0	0	0%	0	0	0%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
5.10	7	0	0%	695	0	0%
5.40	45	0	0%	8,712	0	0%
TOTAL	73	1	1.37%	11,889	12	.10%
6.00 MILLING PRODUCTS						
6.01	53	2	3.77%	1,785	106	5.94%
6.02	0	0	0%	0	0	0%
6.03	0	0	0%	0	0	0%
6.04	0	0	0%	0	0	0%
6.05	10	0	0%	2,653	0	0%
6.06	0	0	0%	18,540	307	1.66%
6.07	17	0	0%	341	0	0%
6.08	174	4	2.30%	18,836	72	.38%
6.09	11	0	0%	366	0	0%
6.40	37	1	2.70%	3,901	12	.31%
TOTAL	302	7	2.32%	46,422	497	1.07%

7.00 PRODUCE

7.01	181	17	9.39%	34,670	4,443	12.82%
7.02	9	0	0%	21,747	0	0%
7.03	137	0	0%	24,475	0	0%
7.04	241	20	8.30%	15,673	683	4.36%
7.05	0	0	0%	0	0	0%
7.06	29	1	3.45%	1,329	17	1.28%
7.40	0	0	0%	0	0	0%
7.50	614	8	1.30%	57,528	1,269	2.21%
TOTAL	1,211	46	3.80%	155,422	6,412	4.13%

8.00 OTHER FOOD PREPARATIONS

8.01	27	0	0%	4,852	0	0%
8.02	0	0	0%	0	0	0%
8.03	10	0	0%	1,497	0	0%
8.04	64	1	1.56%	8,918	948	10.63%
8.05	0	0	0%	0	0	0%
8.06	0	0	0%	0	0	0%
8.07	0	0	0%	0	0	0%
8.08	0	0	0%	0	0	0%
8.09	30	3	10.00%	8,094	110	1.36%
8.10	5	0	0%	31	0	0%
8.11	1	0	0%	150	0	0%
8.12	3	0	0%	139	0	0%
8.40	34	1	2.94%	2,153	5	.23%
TOTAL	174	5	2.87%	25,834	1,063	4.11%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
<u>9.00 BEVERAGES</u>						
9.01	0	0	0%	0	0	0%
9.02	0	0	0%	0	0	0%
9.03	0	0	0%	0	0	0%
9.04	0	0	0%	0	0	0%
9.05	51	1	1.96%	13,547	71	.52%
9.06	0	0	0%	0	0	0%
9.07	12	0	0%	3,500	0	0%
9.08	0	0	0%	0	0	0%
9.09	18	0	0%	5,000	0	0%
9.10	51	0	0%	4,248	0	0%
9.11	41	6	14.63%	5,739	2,881	50.20%
9.12	0	0	0%	0	0	0%
9.13	10	0	0%	772	0	0%
9.14	2	0	0%	24	0	0%
9.15	12	0	0%	250	0	0%
9.16	0	0	0%	0	0	0%
9.17	0	0	0%	0	0	0%
9.18	34	0	0%	3,875	0	0%
9.40	1	0	0%	138	0	0%
TOTAL	232	7	3.02%	37,093	2,952	7.96%

10.00 PHARMACY PRODUCTS

CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
10.01	0	0	0%	0	0	0%
10.02	0	0	0%	0	0	0%
10.03	0	0	0%	0	0	0%
10.04	0	0	0%	0	0	0%
10.05	7	0	0%	1,302	0	0%
10.06	0	0	0%	0	0	0%
10.07	19	0	0%	3,500	0	0%
10.08	0	0	0%	0	0	0%
10.09	0	0	0%	0	0	0%
10.10	0	0	0%	0	0	0%
10.11	12	0	0%	2,000	0	0%
10.12	137	14	10.22%	45,916	21,933	47.77%
10.13	64	22	34.38%	8,906	2,978	33.44%
10.14	5	0	0%	77	0	0%
10.15	2	0	0%	42	0	0%
10.16	0	0	0%	0	0	0%
10.17	5	0	0%	68	0	0%
10.18	0	0	0%	0	0	0%
10.19	0	0	0%	0	0	0%
10.40	0	0	0%	0	0	0%
TOTAL	251	36	14.34%	61,811	24,911	40.30%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
<u>11.00 GARDEN, FARM, PET SUPPLIES</u>						
11.01	2	0	0%	14	0	0%
11.02	3	0	0%	270	0	0%
11.03	0	0	0%	0	0	0%
11.04	5	4	80.00%	284	214	75.35%
11.05	5	0	0%	90	0	0%
11.06	0	0	0%	0	0	0%
11.07	6	0	0%	145	0	0%
11.08	32	1	3.13%	1,764	11	.62%
11.09	75	5	6.67%	3,754	181	4.82%
11.10	0	0	0%	0	0	0%
11.11	90	14	15.56%	8,601	1,341	15.59%
11.12	94	1	1.06%	7,316	8	.11%
11.13	40	0	0%	1,070	0	0%
11.14	48	0	0%	4,508	0	0%
11.15	49	2	4.08%	8,602	23	.27%
11.16	43	1	2.33%	10,017	88	.88%
11.17	35	3	8.57%	1,517	494	32.56%
11.18	0	0	0%	0	0	0%
11.40	4	1	25.00%	315	15	4.76%
TOTAL	531	32	6.03%	48,267	2,375	4.92%

12.00 HARDWARE, AND BUILDING MATERIALS

CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
12.01	188	4	2.13%	34,363	53	.15%
12.02	3	0	0%	450	0	0%
12.03	0	0	0%	0	0	0%
12.04	0	0	0%	0	0	0%
12.05	37	0	0%	10,356	0	0%
12.06	10	0	0%	1,360	0	0%
12.07	59	14	23.73%	22,940	17,325	75.52%
12.08	0	0	0%	0	0	0%
12.09	0	0	0%	0	0	0%
12.10	35	4	11.43%	5,431	1,417	26.09%
12.11	0	0	0%	0	0	0%
12.12	0	0	0%	0	0	0%
12.13	0	0	0%	0	0	0%
12.14	0	0	0%	0	0	0%
12.15	1	1	100.00%	312	312	100.00%
12.16	0	0	0%	0	0	0%
12.17	6	6	100.00%	762	762	100.00%
12.18	3	0	0%	115	0	0%
12.19	0	0	0%	0	0	0%
12.20	0	0	0%	0	0	0%
12.21	0	0	0%	0	0	0%
12.22	6	0	0%	596	0	0%



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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
12.40	19	0	0%	298	0	0%
TOTAL	367	29	7.90%	76,983	19,869	25.81%
13.00 PAINT AND ALLIED PRODUCTS						
13.01	84	0	0%	10,260	0	0%
13.02	43	1	2.33%	2,244	4	.18%
13.03	0	0	0%	0	0	0%
13.04	12	1	8.33%	1,639	789	48.14%
13.05	0	0	0%	0	0	0%
13.06	0	0	0%	0	0	0%
13.07	0	0	0%	0	0	0%
13.08	6	0	0%	180	0	0%
13.09	36	0	0%	4,845	0	0%
13.10	5	0	0%	750	0	0%
13.11	0	0	0%	0	0	0%
13.12	0	0	0%	0	0	0%
13.13	0	0	0%	0	0	0%
13.14	0	0	0%	0	0	0%
13.15	5	2	40.00%	41	17	41.46%
13.40	13	0	0%	708	0	0%
TOTAL	204	4	1.96%	20,667	810	3.92%
14.00 MAINTENANCE SUPPLIES						
14.01	6	0	0%	770	0	0%
14.02	0	0	0%	0	0	0%
14.03	66	2	3.03%	15,201	50	.33%
14.04	44	3	6.82%	854	46	5.39%
14.05	11	3	27.27%	953	19	1.99%
14.06	76	3	3.95%	10,591	1,343	12.68%
14.07	9	0	0%	684	0	0%
14.08	13	0	0%	165	0	0%
14.09	62	0	0%	14,106	0	0%
14.10	2	0	0%	175	0	0%
14.11	0	0	0%	0	0	0%
14.12	40	3	7.50%	1,178	19	1.61%
14.13	25	2	8.00%	5,719	800	13.99%
14.40	42	4	9.53%	6,295	52	.83%
TOTAL	360	20	5.56%	56,691	2,329	4.11%
15.00 PAPER PRODUCTS						
15.01	0	0	0%	0	0	0%
15.02	32	5	15.63%	2,759	289	10.47%
15.03	0	0	0%	0	0	0%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
15.04	11	0	0%	1,182	0	0%
15.05	0	0	0%	0	0	0%
15.06	6	0	0%	1,676	0	0%
15.07	0	0	0%	0	0	0%
15.08	16	0	0%	588	0	0%
15.09	0	0	0%	0	0	0%
15.10	5	0	0%	511	0	0%
15.11	0	0	0%	0	0	0%
15.12	42	0	0%	3,920	0	0%
15.13	53	2	3.77%	20,375	1,103	5.41%
15.14	0	0	0%	0	0	0%
15.15	0	0	0%	0	0	0%
15.40	1	1	100.00%	48	48	100.00%
TOTAL	166	8	4.82%	31,059	1,440	4.64%
16.00 TEXTILE PRODUCTS						
16.01	0	0	0%	0	0	0%
16.02	0	0	0%	0	0	0%
16.03	0	0	0%	0	0	0%
16.04	0	0	0%	0	0	0%
16.05	0	0	0%	0	0	0%
16.06	0	0	0%	0	0	0%
16.07	0	0	0%	0	0	0%
16.08	96	0	0%	16,410	0	0%
16.09	8	0	0%	801	0	0%
16.10	218	14	6.42%	32,177	253	.79%
16.11	0	0	0%	0	0	0%
16.12	6	0	0%	204	0	0%
16.13	0	0	0%	0	0	0%
16.14	0	0	0%	0	0	0%
16.15	1	0	0%	14	0	0%
16.16	0	0	0%	0	0	0%
16.17	5	4	80.00%	5	4	80.00%
16.40	1	0	0%	26	0	0%
TOTAL	335	18	5.37%	49,637	257	.52%
17.00 MISCELLANEOUS						
17.01	0	0	0%	0	0	0%
17.02	0	0	0%	0	0	0%
17.03	12	0	0%	180	0	0%
17.04	3	0	0%	513	0	0%
17.05	12	0	0%	781	0	0%
17.06	0	0	0%	0	0	0%
17.07	0	0	0%	0	0	0%
17.08	0	0	0%	0	0	0%
17.09	1	0	0%	822	0	0%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
17.10	115	25	21.74%	16,518	1,473	8.92%
17.11	7	1	14.29%	284	76	26.76%
17.12	0	0	0%	0	0	0%
17.13	0	0	0%	0	0	0%
17.14	1	1	100.00%	16	16	100.00%
17.15	3	3	100.00%	13	13	100.00%
17.16	1	0	0%	19	0	0%
17.17	8	3	37.50%	5,785	535	9.25%
17.18	2	0	0%	500	0	0%
17.19	0	0	0%	0	0	0%
17.20	0	0	0%	0	0	0%
17.21	6	0	0%	12,160	0	0%
17.22	0	0	0%	0	0	0%
17.23	0	0	0%	0	0	0%
17.24	54	0	0%	2,884	0	0%
17.40	2	1	50.00%	4,757	3	.06%
TOTAL	227	34	14.98%	45,232	2,116	4.68%
ALL CATEGORIES TOTAL	9,322	597	6.40%	2,172,194	112,723	5.19%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
1.00 CONFECTIONS AND FLAVORINGS						
1.01	12	0	0%	3,201	0	0%
1.02	88	1	1.14%	33,222	18	.05%
1.03	37	1	2.70%	17,000	51	.30%
1.04	3	0	0%	55	0	0%
1.05	0	0	0%	0	0	0%
1.06	444	34	7.66%	30,978	7,149	23.08%
1.07	21	6	28.57%	1,361	189	13.89%
1.08	25	0	0%	33,018	15	.05%
1.09	21	0	0%	1,953	0	0%
1.10	25	1	4.00%	682	10	1.47%
1.11	8	1	12.50%	1,814	21	1.16%
1.12	30	0	0%	3,934	0	0%
1.13	80	4	5.00%	20,826	4,745	22.78%
1.14	137	1	.73%	3,167	10	.32%
1.15	0	0	0%	0	0	0%
1.16	0	0	0%	0	0	0%
1.40	18	0	0%	3,332	1	.03%
TOTAL	949	49	5.16%	154,543	12,209	7.90%
2.00 DAIRY-TYPE PRODUCTS						
2.01	0	0	0%	0	0	0%
2.02	126	16	12.70%	14,616	579	3.96%
2.03	201	22	10.95%	52,817	34,075	64.52%
2.04	130	8	6.15%	4,106	147	3.58%
2.05	92	13	14.13%	3,260	288	8.83%
2.06	0	0	0%	0	0	0%
2.07	20	1	5.00%	1,747	1,233	70.58%
2.08	0	0	0%	0	0	0%
2.09	0	0	0%	0	0	0%
2.10	3	0	0%	32	0	0%
2.11	13	0	0%	3,887	0	0%
2.12	3	0	0%	5,000	0	0%
2.13	269	15	5.58%	86,057	35,595	41.36%
2.14	16	1	6.25%	4,002	639	15.97%
2.15	1	1	100.00%	18	18	100.00%
2.16	0	0	0%	0	0	0%
2.17	13	0	0%	130	0	0%
2.40	0	0	0%	0	0	0%
2.50	551	12	2.18%	157,860	2,071	1.31%
TOTAL	1,438	89	6.19%	333,532	74,645	22.38%
3.00 BAKERY GOODS - FRESH, CANNED OR FROZEN						
3.01	311	16	5.14%	14,575	145	.99%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
3.02	0	0	0%	0	0	0%
3.03	2	2	100.00%	1,523	1,523	100.00%
3.04	1	1	100.00%	16	16	100.00%
3.05	1	1	100.00%	3	3	100.00%
3.06	67	15	22.39%	4,717	971	20.59%
3.07	0	0	0%	0	0	0%
3.08	51	0	0%	26,549	0	0%
3.09	4	0	0%	79	0	0%
3.10	64	2	3.13%	42,589	16	.04%
3.11	72	3	4.17%	10,272	417	4.05%
3.12	0	0	0%	0	0	0%
3.13	0	0	0%	0	0	0%
3.40	18	0	0%	255	0	0%
3.50	1,529	82	5.36%	93,452	1,302	1.39%
TOTAL	2,120	122	5.75%	194,030	4,393	2.26%

4.00 MEAT, FISH, POULTRY

4.01	176	0	0%	18,445	6	.03%
4.02	60	4	6.67%	2,447	77	3.15%
4.03	82	2	2.44%	20,278	13	.06%
4.04	0	0	0%	2,174	151	6.95%
4.05	0	0	0%	9,741	90	.92%
4.06	0	0	0%	0	0	0%
4.07	0	0	0%	123	22	17.89%
4.08	0	0	0%	15	15	100.00%
4.09	0	0	0%	5,345	125	2.34%
4.10	0	0	0%	22,102	2,227	10.08%
4.11	0	0	0%	0	0	0%
4.12	0	0	0%	778	453	58.23%
4.13	0	0	0%	0	0	0%
4.14	0	0	0%	295	0	0%
4.40	0	0	0%	7,158	52	.73%
4.50	0	0	0%	550,992	4,883	.89%
TOTAL	318	6	1.89%	639,893	8,114	1.27%

5.00 COOKING OILS, SALAD DRESSINGS, CONDIMENTS

5.01	1	0	0%	72	0	0%
5.02	0	0	0%	0	0	0%
5.03	0	0	0%	0	0	0%
5.04	2	0	0%	16	0	0%
5.05	2	0	0%	16,030	0	0%
5.06	0	0	0%	0	0	0%
5.07	0	0	0%	0	0	0%
5.08	7	1	14.29%	1,200	300	25.00%
5.09	2	1	50.00%	2,011	11	.5%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
5.10	0	0	0%	0	0	0%
5.40	0	0	0%	0	0	0%
TOTAL	14	2	14.29%	19,329	311	1.61%

6.00 MILLING PRODUCTS

6.01	40	1	2.50%	11,003	5	.05%
6.02	0	0	0%	0	0	0%
6.03	0	0	0%	0	0	0%
6.04	0	0	0%	0	0	0%
6.05	19	2	.53%	390	17	4.36%
6.06	0	0	0%	4,592	191	4.16%
6.07	9	2	22.22%	1,006	26	2.58%
6.08	105	4	3.81%	29,616	175	.59%
6.09	6	1	16.67%	215	33	15.35%
6.40	14	0	0%	509	0	0%
TOTAL	193	10	5.18%	47,331	447	.94%

7.00 PRODUCE

7.01	334	24	7.19%	121,083	2,971	2.45%
7.02	78	3	3.85%	87,210	5,630	6.46%
7.03	247	4	1.62%	38,428	846	2.20%
7.04	270	20	7.41%	16,288	726	4.46%
7.05	0	0	0%	0	0	0%
7.06	0	0	0%	0	0	0%
7.40	5	4	80.00%	48	36	75.00%
7.50	542	13	2.40%	40,699	917	2.25%
TOTAL	1,476	68	4.61%	303,756	11,126	3.66%

8.00 OTHER FOOD PREPARATIONS

8.01	7	0	0%	60,742	0	0%
8.02	17	0	0%	8,429	0	0%
8.03	40	1	2.50%	4,558	1,388	30.45%
8.04	0	0	0%	0	0	0%
8.05	30	0	0%	965	0	0%
8.06	70	0	0%	6,341	0	0%
8.07	0	0	0%	0	0	0%
8.08	0	0	0%	0	0	0%
8.09	5	0	0%	6,458	0	0%
8.10	52	0	0%	2,678	0	0%
8.11	57	2	3.51%	7,461	2,028	27.18%
8.12	80	0	0%	4,891	0	0%
8.40	189	12	6.35%	11,098	1,517	13.67%
TOTAL	547	15	2.74%	113,621	4,933	4.34%



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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
<u>9.00 BEVERAGES</u>						
9.01	0	0	0%	0	0	0%
9.02	1	1	100.00%	10	10	100.00%
9.03	0	0	0%	0	0	0%
9.04	0	0	0%	0	0	0%
9.05	86	11	12.79%	272,815	491	.18%
9.06	6	0	0%	900	0	0%
9.07	0	0	0%	0	0	0%
9.08	1	0	0%	10	0	0%
9.09	1	0	0%	72	0	0%
9.10	39	8	20.51%	42,610	25,845	60.65%
9.11	22	1	4.55%	3,803	138	3.63%
9.12	0	0	0%	0	0	0%
9.13	1	0	0%	13	0	0%
9.14	0	0	0%	0	0	0%
9.15	0	0	0%	0	0	0%
9.16	0	0	0%	0	0	0%
9.17	5	0	0%	4,500	0	0%
9.18	5	1	20.00%	638	24	3.76%
9.40	0	0	0%	0	0	0%
TOTAL	167	22	13.17%	325,371	26,508	8.15%

10.00 PHARMACY PRODUCTS

10.01	0	0	0%	0	0	0%
10.02	0	0	0%	0	0	0%
10.03	0	0	0%	0	0	0%
10.04	0	0	0%	0	0	0%
10.05	1	0	0%	800	0	0%
10.06	0	0	0%	0	0	0%
10.07	1	1	100.00%	8	8	100.00%
10.08	0	0	0%	0	0	0%
10.09	0	0	0%	0	0	0%
10.10	0	0	0%	0	0	0%
10.11	6	0	0%	600	0	0%
10.12	121	2	1.65%	46,485	347	.75%
10.13	63	10	15.87%	10,377	1,177	11.34%
10.14	0	0	0%	0	0	0%
10.15	0	0	0%	0	0	0%
10.16	0	0	0%	0	0	0%
10.17	12	0	0%	264	0	0%
10.18	2	0	0%	300	0	0%
10.19	0	0	0%	0	0	0%
10.40	2	0	0%	22	0	0%
TOTAL	208	13	6.25%	58,856	1,532	2.60%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
<u>11.00 GARDEN, FARM, PET SUPPLIES</u>						
11.01	1	0	0%	75	0	0%
11.02	1	0	0%	19	0	0%
11.03	12	1	8.33%	1,601	17	1.06%
11.04	1	0	0%	1,910	0	0%
11.05	0	0	0%	0	0	0%
11.06	20	0	0%	1,203	0	0%
11.07	11	2	18.18%	377	287	76.13%
11.08	60	10	16.67%	14,590	2,326	15.94%
11.09	11	0	0%	405	0	0%
11.10	36	1	2.78%	1,464	600	40.98%
11.11	180	19	10.56%	19,972	1,167	5.84%
11.12	308	3	.97%	64,446	32,937	51.1%
11.13	49	4	8.16%	1,269	59	4.65%
11.14	132	3	2.27%	5,036	18	.36%
11.15	141	0	0%	50,461	0	0%
11.16	135	0	0%	26,440	0	0%
11.17	7	1	14.29%	2,935	17	.58%
11.18	0	0	0%	0	0	0%
11.40	45	1	2.22%	20,325	9	.04%
TOTAL	1,150	45	3.91%	212,528	37,437	17.62%

12.00 HARDWARE, AND BUILDING MATERIALS

12.01	80	4	5.00%	11,884	78	.66%
12.02	18	0	0%	408	0	0%
12.03	0	0	0%	0	0	0%
12.04	3	0	0%	10	0	0%
12.05	17	0	0%	5,035	0	0%
12.06	0	0	0%	0	0	0%
12.07	23	8	34.78%	4,939	3,189	64.57%
12.08	0	0	0%	0	0	0%
12.09	8	6	75.00%	1,027	887	86.37%
12.10	64	5	7.81%	3,794	131	3.45%
12.11	6	1	16.67%	197	10	5.08%
12.12	0	0	0%	0	0	0%
12.13	0	0	0%	0	0	0%
12.14	0	0	0%	0	0	0%
12.15	1	1	100.00%	750	750	100.00%
12.16	0	0	0%	0	0	0%
12.17	12	9	75.00%	287	271	94.43%
12.18	0	0	0%	0	0	0%
12.19	0	0	0%	0	0	0%
12.20	0	0	0%	0	0	0%
12.21	0	0	0%	0	0	0%
12.22	3	0	0%	8,740	0	0%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
12.40	34	15	44.12%	1,865	192	10.29%
TOTAL	269	49	18.22%	39,836	5,508	13.83%
<u>13.00 PAINT AND ALLIED PRODUCTS</u>						
13.01	233	24	10.30%	18,250	1,331	7.29%
13.02	81	4	4.94%	7,901	1,350	17.09%
13.03	18	0	0%	1,500	0	0%
13.04	1	0	0%	723	0	0%
13.05	3	0	0%	134	0	0%
13.06	7	0	0%	120	0	0%
13.07	0	0	0%	0	0	0%
13.08	50	5	10.00%	23,733	21,056	88.72%
13.09	46	1	2.17%	10,112	2,268	22.43%
13.10	0	0	0%	0	0	0%
13.11	0	0	0%	0	0	0%
13.12	0	0	0%	0	0	0%
13.13	6	0	0%	100	0	0%
13.14	0	0	0%	0	0	0%
13.15	7	0	0%	78	0	0%
13.40	28	0	0%	1,486	0	0%
TOTAL	480	34	7.08%	64,137	26,005	40.55%
<u>14.00 MAINTENANCE SUPPLIES</u>						
14.01	0	0	0%	0	0	0%
14.02	0	0	0%	0	0	0%
14.03	62	9	14.52%	31,850	3,549	11.14%
14.04	24	3	12.50%	2,270	93	4.10%
14.05	32	10	31.25%	2,734	1,639	59.95%
14.06	101	21	20.79%	22,505	3,065	13.62%
14.07	11	3	27.27%	1,796	360	20.04%
14.08	0	0	0%	0	0	0%
14.09	0	0	0%	0	0	0%
14.10	0	0	0%	0	0	0%
14.11	1	0	0%	45	0	0%
14.12	8	1	12.50%	412	20	4.85%
14.13	40	4	10.00%	9,223	3,712	40.25%
14.40	107	30	28.04%	21,595	1,900	8.80%
TOTAL	386	81	20.98%	92,430	14,338	15.51%
<u>15.00 PAPER PRODUCTS</u>						
15.01	3	0	0%	100	0	0%
15.02	6	0	0%	13,639	0	0%
15.03	0	0	0%	0	0	0%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
15.04	0	0	0%	0	0	0%
15.05	0	0	0%	0	0	0%
15.06	7	1	14.29%	812	200	24.63%
15.07	12	0	0%	78	0	0%
15.08	0	0	0%	0	0	0%
15.09	0	0	0%	0	0	0%
15.10	5	2	40.00%	874	74	8.47%
15.11	0	0	0%	0	0	0%
15.12	0	0	0%	0	0	0%
15.13	32	1	3.13%	6,526	240	3.68%
15.14	0	0	0%	0	0	0%
15.15	0	0	0%	0	0	0%
15.40	2	0	0%	92	0	0%
TOTAL	67	4	5.97%	22,121	514	2.32%
<u>16.00 TEXTILE PRODUCTS</u>						
16.01	0	0	0%	0	0	0%
16.02	0	0	0%	0	0	0%
16.03	0	0	0%	0	0	0%
16.04	0	0	0%	0	0	0%
16.05	0	0	0%	0	0	0%
16.06	1	0	0%	10	0	0%
16.07	12	0	0%	1,345	0	0%
16.08	0	0	0%	0	0	0%
16.09	0	0	0%	0	0	0%
16.10	189	19	10.05%	6,420	471	7.34%
16.11	5	0	0%	60	0	0%
16.12	0	0	0%	0	0	0%
16.13	0	0	0%	0	0	0%
16.14	2	2	100.00%	121	121	100.00%
16.15	0	0	0%	0	0	0%
16.16	0	0	0%	0	0	0%
16.17	3	3	100.00%	139	139	100.00%
16.40	6	3	50.00%	657	379	57.69%
TOTAL	218	27	12.39%	8,752	1,082	12.36%
<u>17.00 MISCELLANEOUS</u>						
17.01	0	0	0%	0	0	0%
17.02	0	0	0%	0	0	0%
17.03	68	0	0%	6,615	0	0%
17.04	0	0	0%	0	0	0%
17.05	0	0	0%	0	0	0%
17.06	0	0	0%	0	0	0%
17.07	0	0	0%	0	0	0%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
17.08	0	0	0%	0	0	0%
17.09	0	0	0%	0	0	0%
17.10	31	1	3.23%	1,486	6	.40%
17.11	12	0	0%	5,030	0	0%
17.12	0	0	0%	0	0	0%
17.13	1	0	0%	132	0	0%
17.14	0	0	0%	0	0	0%
17.15	0	0	0%	0	0	0%
17.16	4	0	0%	1,127	0	0%
17.17	41	1	2.44%	8,941	246	2.75%
17.18	3	2	66.67%	2,151	15	.70%
17.19	0	0	0%	0	0	0%
17.20	0	0	0%	0	0	0%
17.21	0	0	0%	0	0	0%
17.22	0	0	0%	0	0	0%
17.23	0	0	0%	0	0	0%
17.24	6	0	0%	27,472	0	0%
17.40	2	0	0%	19	0	0%
TOTAL	168	4	2.38%	52,973	267	.50%
ALL CATEGORIES TOTAL	10,168	640	6.29%	2,683,039	229,369	8.55%

DIVISION OF MEASUREMENT STANDARDS  
QUANTITY CONTROL  
SUB-CATEGORIES AND % DEFECTIVE REPORT  
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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
1.00 CONFECTIONS & FLAVORINGS						
1.01	7	0	0%	635	0	0%
1.02	138	0	0%	49,220	0	0%
1.03	199	4	2.01%	27,603	913	3.30%
1.04	12	0	0%	689	0	0%
1.05	1	1	100.00%	21	21	100.00%
1.06	372	120	32.26%	33,798	765	2.26%
1.07	15	1	6.66%	745	5	.67%
1.08	46	1	2.17%	2,285	15	.66%
1.09	21	0	0%	768	0	0%
1.10	0	0	0%	0	0	0%
1.11	9	0	0%	3,388	0	0%
1.12	95	0	0%	10,156	0	0%
1.13	33	0	0%	1,990	0	0%
1.14	35	0	0%	1,196	0	0%
1.15	1	0	0%	160	0	0%
1.16	0	0	0%	0	0	0%
1.40	86	1	1.16%	13,513	24	.18%
TOTAL	1,070	128	11.96%	146,167	1,743	1.19%
2.00 DAIRY-TYPE PRODUCTS						
2.01	0	0	0%	0	0	0%
2.02	26	0	0%	1,070	0	0%
2.03	46	0	0%	45,834	0	0%
2.04	157	5	3.18%	13,332	58	.44%
2.05	69	4	5.80%	2,607	46	1.76%
2.06	2	1	50.00%	162	4	2.47%
2.07	18	8	44.44%	208	84	40.38%
2.08	0	0	0%	0	0	0%
2.09	0	0	0%	0	0	0%
2.10	0	0	0%	0	0	0%
2.11	3	0	0%	262	0	0%
2.12	2	0	0%	31	0	0%
2.13	225	11	4.89%	18,955	1,479	7.80%
2.14	1	0	0%	14	0	0%
2.15	0	0	0%	0	0	0%
2.16	14	0	0%	764	0	0%
2.17	0	0	0%	0	0	0%
2.40	0	0	0%	0	0	0%
2.50	896	48	5.36%	178,103	4,291	2.41%
TOTAL	1,459	77	5.28%	261,342	5,962	2.28%
3.00 BAKERY GOODS - CANNED, FRESH, OR FROZEN						
3.01	122	17	13.93%	1,833	66	3.60%



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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
3.02	0	0	0%	0	0	0%
3.03	6	1	16.67%	88	10	11.36%
3.04	8	0	0%	95	0	0%
3.05	0	0	0%	0	0	0%
3.06	74	1	1.35%	1,741	7	.40%
3.07	0	0	0%	0	0	0%
3.08	1	0	0%	600	0	0%
3.09	7	0	0%	52	0	0%
3.10	24	0	0%	23,826	0	0%
3.11	44	1	2.27%	12,000	20	.16%
3.12	0	0	0%	0	0	0%
3.13	0	0	0%	0	0	0%
3.40	2	2	100.00%	110	110	100.00%
3.50	1,684	138	8.19%	128,953	1,758	1.36%
TOTAL	1,972	160	8.11%	169,298	1,971	1.13%

4.00 MEAT, FISH, POULTRY

4.01	9	0	0%	633	0	0%
4.02	59	17	28.81%	16,589	8,048	48.51%
4.03	5	4	80.00%	66	26	39.39%
4.04	0	0	0%	2,523	7	.27%
4.05	0	0	0%	8,045	24	.29%
4.06	0	0	0%	0	0	0%
4.07	0	0	0%	1,071	83	7.74%
4.08	0	0	0%	0	0	0%
4.09	0	0	0%	4,073	397	9.74%
4.10	0	0	0%	14,677	1,029	7.01%
4.11	0	0	0%	0	0	0%
4.12	0	0	0%	512	179	34.96%
4.13	0	0	0%	0	0	0%
4.14	0	0	0%	455	92	20.21%
4.40	0	0	0%	30	19	63.33%
4.50	0	0	0%	534,629	4,158	.77%
TOTAL	73	21	28.76%	583,303	14,062	2.41%

5.00 COOKING OILS, SALAD DRESSINGS, CONDIMENT

5.01	1	1	100.00%	21	21	100.00%
5.02	0	0	0%	0	0	0%
5.03	0	0	0%	0	0	0%
5.04	0	0	0%	0	0	0%
5.05	6	0	0%	600	0	0%
5.06	0	0	0%	0	0	0%
5.07	10	0	0%	546	0	0%
5.08	31	1	3.22%	4,112	27	.65%
5.09	0	0	0%	0	0	0%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
5.10	0	0	0%	0	0	0%
5.40	0	0	0%	0	0	0%
TOTAL	48	2	4.16%	5,279	48	.90%

6.00 MILLING PRODUCTS

6.01	55	0	0%	3,039	0	0%
6.02	0	0	0%	0	0	0%
6.03	0	0	0%	0	0	0%
6.04	1	1	100.00%	10	10	100.00%
6.05	22	2	9.09%	4,890	35	.71%
6.06	0	0	0%	6,863	444	6.46%
6.07	0	0	0%	0	0	0%
6.08	179	12	6.70%	14,191	333	2.34%
6.09	0	0	0%	0	0	0%
6.40	1	0	0%	200	0	0%
TOTAL	258	15	5.81%	29,193	822	2.81%

7.00 PRODUCE

7.01	357	25	7.00%	73,095	1,115	1.52%
7.02	102	3	2.94%	43,861	15,401	35.11%
7.03	358	6	1.67%	57,875	210	.36%
7.04	178	27	15.16%	11,448	978	8.54%
7.05	0	0	0%	0	0	0%
7.06	0	0	0%	0	0	0%
7.40	0	0	0%	0	0	0%
7.50	365	14	3.83%	35,979	201	.55%
TOTAL	1,360	75	5.51%	222,258	17,905	8.05%

8.00 OTHER FOOD PREPARATIONS

8.01	0	0	0%	0	0	0%
8.02	0	0	0%	0	0	0%
8.03	3	0	0%	1,403	0	0%
8.04	6	2	33.33%	154	54	35.06%
8.05	23	0	0%	678	0	0%
8.06	6	0	0%	180	0	0%
8.07	0	0	0%	0	0	0%
8.08	1	0	0%	14	0	0%
8.09	5	0	0%	16,100	0	0%
8.10	0	0	0%	0	0	0%
8.11	74	1	1.35%	8,347	6	.07%
8.12	0	0	0%	0	0	0%
8.40	129	7	5.42%	4,141	122	2.94%
TOTAL	247	10	4.04%	31,017	182	.58%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
9.01	0	0	0%	0	0	0%
9.02	0	0	0%	0	0	0%
9.03	0	0	0%	0	0	0%
9.04	0	0	0%	0	0	0%
9.05	32	2	6.25%	5,495	517	9.40%
9.06	0	0	0%	0	0	0%
9.07	12	1	8.33%	2,500	96	3.84%
9.08	0	0	0%	0	0	0%
9.09	0	0	0%	0	0	0%
9.10	51	2	3.92%	14,793	2,208	14.92%
9.11	2	0	0%	45	0	0%
9.12	0	0	0%	0	0	0%
9.13	42	2	4.76%	6,517	16	.24%
9.14	6	0	0%	350	0	0%
9.15	0	0	0%	0	0	0%
9.16	1	0	0%	215	0	0%
9.17	23	1	4.34%	5,160	198	3.83%
9.18	0	0	0%	0	0	0%
9.40	0	0	0%	0	0	0%
TOTAL	169	8	4.73%	35,075	3,035	8.65%

10.00 PHARMACY PRODUCTS

10.01	0	0	0%	0	0	0%
10.02	0	0	0%	0	0	0%
10.03	0	0	0%	0	0	0%
10.04	0	0	0%	0	0	0%
10.05	0	0	0%	0	0	0%
10.06	0	0	0%	0	0	0%
10.07	7	1	14.28%	2,284	384	16.81%
10.08	0	0	0%	0	0	0%
10.09	0	0	0%	0	0	0%
10.10	0	0	0%	0	0	0%
10.11	1	1	100.00%	10	10	100.00%
10.12	37	4	10.81%	6,261	2,511	40.10%
10.13	23	6	26.03%	5,422	1,755	32.36%
10.14	0	0	0%	0	0	0%
10.15	4	0	0%	59	0	0%
10.16	0	0	0%	0	0	0%
10.17	0	0	0%	0	0	0%
10.18	0	0	0%	0	0	0%
10.19	0	0	0%	0	0	0%
10.40	1	0	0%	300	0	0%
TOTAL	73	12	16.43%	14,336	4,660	32.50%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
11.00 GARDEN, FARM, PET SUPPLIES						
11.01	2	0	0%	1,860	0	0%
11.02	0	0	0%	0	0	0%
11.03	3	0	0%	1,164	0	0%
11.04	1	0	0%	30	0	0%
11.05	31	2	6.45%	3,990	222	5.56%
11.06	11	2	18.18%	459	14	3.05%
11.07	18	0	0%	4,174	0	0%
11.08	105	7	6.66%	16,366	687	4.19%
11.09	24	7	29.16%	5,435	160	2.94%
11.10	3	0	0%	85	0	0%
11.11	175	10	5.71%	12,603	408	3.23%
11.12	56	4	7.14%	2,983	101	3.38%
11.13	3	0	0%	308	0	0%
11.14	22	0	0%	375	0	0%
11.15	90	3	3.33%	13,966	48	.34%
11.16	40	1	2.50%	6,434	10	.15%
11.17	38	0	0%	3,240	0	0%
11.18	0	0	0%	0	0	0%
11.40	9	0	0%	11,378	0	0%
TOTAL	631	36	5.70%	84,850	1,650	1.94%

12.00 HARDWARE AND BUILDING MATERIALS

12.01	12	0	0%	345	0	0%
12.02	6	0	0%	581	0	0%
12.03	6	0	0%	120	0	0%
12.04	0	0	0%	0	0	0%
12.05	6	0	0%	195	0	0%
12.06	4	2	50.00%	200	48	24.00%
12.07	19	2	10.52%	7,196	30	.41%
12.08	24	3	1.25%	2,845	743	26.11%
12.09	4	2	50.00%	602	487	80.89%
12.10	34	0	0%	2,516	0	0%
12.11	0	0	0%	0	0	0%
12.12	0	0	0%	0	0	0%
12.13	0	0	0%	0	0	0%
12.14	0	0	0%	0	0	0%
12.15	0	0	0%	0	0	0%
12.16	0	0	0%	0	0	0%
12.17	1	1	100.00%	3,400	3,400	100.00%
12.18	1	0	0%	150	0	0%
12.19	0	0	0%	0	0	0%
12.20	0	0	0%	0	0	0%
12.21	0	0	0%	0	0	0%
12.22	0	0	0%	0	0	0%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
12.40	13	1	7.69%	1,590	160	10.06%
TOTAL	130	11	8.46%	19,740	4,868	24.66%
13.00 PAINT AND ALLIED PRODUCTS						
13.01	197	1	.50%	21,340	43	.20%
13.02	98	5	5.10%	27,103	4,980	18.37%
13.03	0	0	0%	0	0	0%
13.04	0	0	0%	0	0	0%
13.05	19	0	0%	950	0	0%
13.06	0	0	0%	0	0	0%
13.07	0	0	0%	0	0	0%
13.08	37	3	8.10%	2,770	118	4.26%
13.09	4	0	0%	600	0	0%
13.10	0	0	0%	0	0	0%
13.11	0	0	0%	0	0	0%
13.12	0	0	0%	0	0	0%
13.13	0	0	0%	0	0	0%
13.14	0	0	0%	0	0	0%
13.15	0	0	0%	0	0	0%
13.40	17	1	5.88%	1,619	65	4.01%
TOTAL	372	10	2.68%	54,382	5,206	9.57%
14.00 MAINTENANCE SUPPLIES						
14.01	0	0	0%	0	0	0%
14.02	0	0	0%	0	0	0%
14.03	2	1	50.00%	611	11	1.80%
14.04	2	2	100.00%	60	60	100.00%
14.05	19	1	5.26%	16	7	43.75%
14.06	116	5	4.31%	14,464	1,413	9.76%
14.07	0	0	0%	0	0	0%
14.08	0	0	0%	0	0	0%
14.09	0	0	0%	0	0	0%
14.10	0	0	0%	0	0	0%
14.11	0	0	0%	0	0	0%
14.12	8	2	25.00%	421	95	22.56%
14.13	14	0	0%	756	0	0%
14.40	11	1	9.09%	702	180	25.64%
TOTAL	172	12	6.97%	17,030	1,766	10.36%
15.00 PAPER PRODUCTS						
15.01	0	0	0%	0	0	0%
15.02	23	6	38.33%	11,768	9,271	78.78%
15.03	0	0	0%	0	0	0%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
15.04	9	2	45.00%	2,973	960	32.29%
15.05	0	0	0%	0	0	0%
15.06	1	0	0%	300	0	0%
15.07	0	0	0%	0	0	0%
15.08	13	4	30.76%	4,029	1,363	33.82%
15.09	0	0	0%	0	0	0%
15.10	7	0	0%	21	0	0%
15.11	0	0	0%	0	0	0%
15.12	0	0	0%	0	0	0%
15.13	44	6	13.64%	3,625	226	6.23%
15.14	0	0	0%	0	0	0%
15.15	0	0	0%	0	0	0%
15.40	5	0	0%	1,300	0	0%
TOTAL	102	18	17.64%	24,016	11,820	49.21%
16.00 TEXTILE PRODUCTS						
16.01	0	0	0%	0	0	0%
16.02	0	0	0%	0	0	0%
16.03	0	0	0%	0	0	0%
16.04	0	0	0%	0	0	0%
16.05	0	0	0%	0	0	0%
16.06	0	0	0%	0	0	0%
16.07	3	2	66.66%	85	44	51.76%
16.08	0	0	0%	0	0	0%
16.09	0	0	0%	0	0	0%
16.10	70	5	7.14%	2,310	632	27.35%
16.11	6	0	0%	72	0	0%
16.12	0	0	0%	0	0	0%
16.13	0	0	0%	0	0	0%
16.14	1	0	0%	90	0	0%
16.15	0	0	0%	0	0	0%
16.16	0	0	0%	0	0	0%
16.17	0	0	0%	0	0	0%
16.40	1	1	100.00%	17	17	100.00%
TOTAL	81	8	9.87%	2,574	693	26.92%
17.00 MISCELLANEOUS						
17.01	7	0	0%	900	0	0%
17.02	0	0	0%	0	0	0%
17.03	96	0	0%	5,039	0	0%
17.04	0	0	0%	0	0	0%
17.05	35	14	40.00%	1,285	851	66.22%
17.06	0	0	0%	0	0	0%
17.07	0	0	0%	0	0	0%



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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
17.08	0	0	0%	0	0	0%
17.09	0	0	0%	0	0	0%
17.10	63	2	3.17%	6,502	31	.47%
17.11	13	2	15.38%	199	29	14.57%
17.12	3	0	0%	41	0	0%
17.13	0	0	0%	0	0	0%
17.14	1	0	0%	150	0	0%
17.15	0	0	0%	0	0	0%
17.16	23	4	17.39%	933	122	13.07%
17.17	30	0	0%	3,490	0	0%
17.18	0	0	0%	0	0	0%
17.19	2	0	0%	170	0	0%
17.20	0	0	0%	0	0	0%
17.21	0	0	0%	0	0	0%
17.22	0	0	0%	0	0	0%
17.23	0	0	0%	0	0	0%
17.24	25	0	0%	8,131	0	0%
17.40	15	0	0%	203	0	0%
TOTAL	313	22	7.02%	27,043	1,033	3.81%
ALL CATEGORIES						
TOTAL	8,530	625	7.32%	1,726,903	77,426	4.48%

DIVISION OF MEASUREMENT STANDARDS  
QUANTITY CONTROL  
SUB-CATEGORIES AND % DEFECTIVE REPORT  
2ND QUARTER - APRIL, 1975 THRU JUNE 1975

CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
1.00 CONFECTIONS & FLAVORINGS						
1.01	9	0	0%	1,350	0	0%
1.02	263	2	.76%	103,869	593	.57%
1.03	288	33	11.45%	74,440	866	1.16%
1.04	13	1	7.69%	883	58	6.57%
1.05	16	0	0%	391	0	0%
1.06	562	23	4.09%	36,585	2,389	6.53%
1.07	1	0	0%	500	0	0%
1.08	315	21	6.67%	48,895	10,685	21.85%
1.09	34	11	32.35%	8,014	206	2.57%
1.10	18	0	0%	1,725	0	0%
1.11	30	4	13.33%	2,008	583	29.03%
1.12	78	0	0%	12,647	0	0%
1.13	150	4	2.67%	175,664	50	.03%
1.14	292	22	7.53%	22,721	1,163	5.12%
1.15	0	0	0%	0	0	0%
1.16	0	0	0%	0	0	0%
1.40	307	20	6.51%	50,774	1,131	2.23%
TOTAL	2,376	141	5.93%	540,466	17,724	3.28%
2.00 DAIRY-TYPE PRODUCTS						
2.01	0	0	0%	0	0	0%
2.02	102	6	5.88%	14,729	704	4.78%
2.03	134	4	2.99%	14,723	186	1.26%
2.04	349	9	2.58%	119,168	391	.33%
2.05	239	14	5.86%	11,516	1,068	9.27%
2.06	12	2	16.67%	2,132	25	1.17%
2.07	145	8	5.52%	11,655	201	1.72%
2.08	0	0	0%	0	0	0%
2.09	10	1	10.00%	2,235	298	13.33%
2.10	14	3	21.43%	23,780	23,263	97.83%
2.11	4	1	25.00%	1,797	1,123	62.49%
2.12	9	1	11.11%	991	13	1.31%
2.13	938	50	5.33%	136,170	4,215	3.10%
2.14	14	0	0%	514	0	0%
2.15	5	1	20.00%	138	10	7.25%
2.16	1	0	0%	22	0	0%
2.17	71	0	0%	1,454	0	0%
2.40	21	0	0%	3,731	0	0%
2.50	2,435	129	5.30%	578,626	30,803	5.32%
TOTAL	4,503	229	5.09%	923,381	62,300	6.75%
3.00 BAKERY GOODS - CANNED, FRESH, OR FROZEN						
3.01	778	76	9.77%	33,219	957	2.88%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
3.02	4	1	25.00%	1,509	9	.60%
3.03	9	6	66.67%	4,300	1,859	43.23%
3.04	35	1	2.86%	1,168	51	4.37%
3.05	19	1	5.26%	3,295	2,968	90.08%
3.06	289	26	9.00%	12,556	1,756	13.99%
3.07	1	1	100.00%	16	16	100.00%
3.08	56	1	1.79%	1,148	6	.52%
3.09	5	0	0%	175	0	0%
3.10	89	1	1.12%	8,594	10	.12%
3.11	87	7	8.05%	21,099	319	1.51%
3.12	0	0	0%	0	0	0%
3.13	0	0	0%	0	0	0%
3.40	82	1	1.22%	1,009	13	1.29%
3.50	5,476	256	4.67%	364,439	9,782	2.68%
TOTAL	6,930	378	5.45%	452,527	17,746	3.92%

4.00 MEAT, FISH, POULTRY

4.01	127	0	0%	19,024	0	0%
4.02	194	17	8.76%	81,632	6,684	8.19%
4.03	24	5	20.83%	2,665	491	18.42%
4.04	0	0	0%	3,901	149	3.82%
4.05	0	0	0%	16,722	127	.76%
4.06	0	0	0%	443	43	9.71%
4.07	0	0	0%	2,314	1,143	49.39%
4.08	0	0	0%	49	40	81.63%
4.09	0	0	0%	14,293	470	3.29%
4.10	0	0	0%	69,645	2,923	4.20%
4.11	0	0	0%	234	144	61.54%
4.12	0	0	0%	3,501	506	14.45%
4.13	0	0	0%	1,480	0	0%
4.14	0	0	0%	378	29	7.67%
4.40	0	0	0%	53,797	274	.51%
4.50	0	0	0%	1,880,903	69,195	3.68%
TOTAL	345	22	6.38%	2,150,981	82,218	3.82%

5.00 COOKING OILS, SALAD DRESSINGS, CONDIMENT

5.01	3	1	33.33%	618	244	39.48%
5.02	0	0	0%	0	0	0%
5.03	3	0	0%	550	0	0%
5.04	12	0	0%	2,657	0	0%
5.05	7	0	0%	1,050	0	0%
5.06	0	0	0%	0	0	0%
5.07	16	0	0%	789	0	0%
5.08	161	3	1.86%	27,887	488	1.75%
5.09	10	0	0%	5,350	0	0%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
5.10	85	0	0%	5,456	1	.02%
5.40	171	6	3.51%	25,449	819	3.22%
TOTAL	468	10	2.14%	69,806	1,552	2.22%
6.00 MILLING PRODUCTS						
6.01	204	3	1.47%	7,230	26	.36%
6.02	14	2	14.29%	260	8	3.08%
6.03	1	0	0%	1,692	157	9.28%
6.04	0	0	0%	2	2	100.00%
6.05	93	2	2.15%	7,050	109	1.55%
6.06	0	0	0%	66,192	7,074	10.69%
6.07	82	7	8.54%	1,658	237	14.29%
6.08	482	43	8.92%	58,673	8,564	14.60%
6.09	96	10	10.42%	17,229	2,360	13.70%
6.40	276	14	5.07%	3,758	111	2.95%
TOTAL	1,248	81	6.49%	163,744	18,648	11.39%

7.00 PRODUCE

7.01	857	29	3.38%	86,305	4,093	4.74%
7.02	345	12	3.48%	33,354	898	2.69%
7.03	237	2	.84%	38,129	13	.03%
7.04	757	69	9.11%	83,590	5,480	6.56%
7.05	51	1	1.96%	4,572	15	.33%
7.06	7	0	0%	240	0	0%
7.40	34	0	0%	1,844	0	0%
7.50	2,617	87	3.32%	321,258	5,748	1.79%
TOTAL	4,905	200	4.08%	569,292	16,247	2.85%

8.00 OTHER FOOD PREPARATIONS

8.01	50	4	8.00%	59,996	14,764	24.61%
8.02	9	1	11.11%	933	2	.21%
8.03	15	0	0%	557	0	0%
8.04	17	0	0%	2,700	0	0%
8.05	9	1	11.11%	157	11	7.01%
8.06	26	0	0%	1,031	0	0%
8.07	48	0	0%	1,560	0	0%
8.08	6	0	0%	900	0	0%
8.09	68	9	13.24%	140,874	50,689	35.98%
8.10	59	0	0%	1,745	0	0%
8.11	153	4	2.61%	13,265	62	.47%
8.12	28	2	7.14%	2,990	25	.84%
8.40	503	54	10.74%	57,386	34,849	60.73%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
TOTAL	991	75	7.57%	284,094	100,402	35.34%
9.00 BEVERAGES						
9.01	0	0	0%	0	0	0%
9.02	0	0	0%	0	0	0%
9.03	0	0	0%	0	0	0%
9.04	0	0	0%	0	0	0%
9.05	183	26	14.21%	92,924	13,087	14.08%
9.06	24	8	33.33%	6,633	729	10.99%
9.07	39	4	10.26%	2,448	471	19.24%
9.08	0	0	0%	0	0	0%
9.09	23	0	0%	3,300	0	0%
9.10	67	6	8.96%	25,913	3,944	15.22%
9.11	14	0	0%	5,338	0	0%
9.12	4	0	0%	67	0	0%
9.13	22	0	0%	185	0	0%
9.14	1	0	0%	4	0	0%
9.15	0	0	0%	0	0	0%
9.16	7	0	0%	383	0	0%
9.17	3	0	0%	45	0	0%
9.18	40	0	0%	8,741	0	0%
9.40	3	3	100.00%	693	693	100.00%
TOTAL	430	47	10.93%	146,674	18,924	12.90%
10.00 PHARMACY PRODUCTS						
10.01	0	0	0%	0	0	0%
10.02	6	0	0%	92	0	0%
10.03	1	0	0%	115	0	0%
10.04	19	0	0%	908	0	0%
10.05	2	2	100.00%	21	21	100.00%
10.06	0	0	0%	0	0	0%
10.07	30	2	6.67%	6,916	18	.26%
10.08	11	0	0%	1,054	0	0%
10.09	0	0	0%	0	0	0%
10.10	0	0	0%	0	0	0%
10.11	16	0	0%	5,100	0	0%
10.12	245	40	16.33%	50,553	16,089	31.83%
10.13	176	20	11.36%	53,165	12,511	23.53%
10.14	0	0	0%	0	0	0%
10.15	5	0	0%	31	0	0%
10.16	0	0	0%	0	0	0%
10.17	8	1	12.50%	388	155	39.95%
10.18	0	0	0%	0	0	0%
10.19	0	0	0%	0	0	0%
10.40	22	1	4.55%	2,458	148	6.02%
TOTAL	541	66	12.20%	120,801	28,942	23.96%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
11.00 GARDEN, FARM, PET SUPPLIES						
11.01	7	1	14.29%	265	25	9.43%
11.02	4	3	75.00%	44	32	72.73%
11.03	9	2	22.22%	5,232	4,325	82.66%
11.04	0	0	0%	0	0	0%
11.05	107	7	6.54%	8,610	215	2.50%
11.06	152	2	1.32%	8,073	510	6.32%
11.07	87	5	5.75%	3,702	61	1.65%
11.08	633	19	3.00%	93,817	2,379	2.54%
11.09	197	23	11.68%	32,457	2,077	6.40%
11.10	39	6	15.38%	4,241	416	9.81%
11.11	180	19	10.56%	17,701	618	3.49%
11.12	251	20	7.97%	154,247	2,903	1.88%
11.13	83	2	2.41%	25,375	1,563	6.16%
11.14	57	2	3.51%	3,998	221	5.53%
11.15	329	2	.61%	34,456	89	.26%
11.16	74	2	2.70%	6,837	25	.37%
11.17	44	5	11.36%	10,716	632	5.90%
11.18	9	5	55.56%	172	92	53.49%
11.40	76	3	3.95%	6,674	138	2.07%
TOTAL	2,338	128	5.47%	416,617	16,321	3.92%
12.00 HARDWARE & BUILDING MATERIALS						
12.01	447	13	2.91%	77,251	33,746	43.68%
12.02	41	3	7.32%	5,646	1,566	27.74%
12.03	0	0	0%	0	0	0%
12.04	9	0	0%	132	0	0%
12.05	15	0	0%	665	0	0%
12.06	23	2	8.70%	2,027	438	21.61%
12.07	19	2	10.53%	2,097	72	3.43%
12.08	53	4	7.55%	2,732	167	6.11%
12.09	18	5	27.78%	1,238	278	22.46%
12.10	155	7	4.52%	16,281	1,191	7.32%
12.11	26	4	13.38%	7,999	2,443	30.54%
12.12	0	0	0%	0	0	0%
12.13	0	0	0%	0	0	0%
12.14	18	0	0%	1,801	0	0%
12.15	7	0	0%	935	0	0%
12.16	1	0	0%	24	0	0%
12.17	84	30	35.71%	27,892	21,841	78.31%
12.18	28	0	0%	6,702	0	0%
12.19	2	0	0%	200	0	0%
12.20	0	0	0%	0	0	0%
12.21	5	0	0%	683	0	0%
12.22	7	0	0%	439	0	0%



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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
12.40	60	3	5.00%	5,925	64	1.08%
TOTAL	1,018	73	7.17%	160,939	61,806	38.47%
13.00 PAINT & ALLIED PRODUCTS						
13.01	588	9	1.53%	35,694	635	1.78%
13.02	225	4	1.78%	17,486	193	1.10%
13.03	73	0	0%	6,425	0	0%
13.04	17	0	0%	2,171	0	0%
13.05	96	0	0%	9,350	0	0%
13.06	20	2	10.00%	2,907	407	14.00%
13.07	2	0	0%	15	0	0%
13.08	109	17	15.60%	29,476	12,467	42.30%
13.09	63	4	6.35%	5,448	143	2.62%
13.10	9	0	0%	950	0	0%
13.11	0	0	0%	0	0	0%
13.12	0	0	0%	0	0	0%
13.13	0	0	0%	0	0	0%
13.14	0	0	0%	0	0	0%
13.15	6	0	0%	1,030	0	0%
13.40	179	2	1.12%	35,817	25	.07%
TOTAL	1,387	38	2.74%	146,769	13,870	9.45%
14.00 MAINTENANCE SUPPLIES						
14.01	14	0	0%	1,460	0	0%
14.02	1	0	0%	20	0	0%
14.03	131	23	17.56%	6,034	1,965	32.57%
14.04	12	2	16.67%	492	52	10.57%
14.05	16	3	18.75%	898	114	12.69%
14.06	362	16	4.42%	37,547	10,588	28.20%
14.07	19	5	26.32%	2,829	738	26.09%
14.08	0	0	0%	0	0	0%
14.09	20	0	0%	297	0	0%
14.10	1	0	0%	265	0	0%
14.11	16	0	0%	8,144	0	0%
14.12	13	0	0%	1,350	0	0%
14.13	225	13	5.78%	14,390	1,243	8.64%
14.40	30	2	6.67%	10,574	2,280	21.56%
TOTAL	860	64	7.44%	84,300	16,980	20.14%
15.00 PAPER PRODUCTS						
15.01	0	0	0%	0	0	0%
15.02	83	25	30.12%	226,146	219,699	97.15%
15.03	1	0	0%	15	0	0%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
15.04	3	2	66.67%	105	90	85.71%
15.05	0	0	0%	0	0	0%
15.06	4	0	0%	1,195	0	0%
15.07	0	0	0%	0	0	0%
15.08	40	2	5.00%	7,751	21	.27%
15.09	0	0	0%	0	0	0%
15.10	11	5	45.45%	38,285	29,276	76.47%
15.11	0	0	0%	0	0	0%
15.12	0	0	0%	0	0	0%
15.13	28	3	10.71%	16,606	987	5.94%
15.14	0	0	0%	0	0	0%
15.15	0	0	0%	0	0	0%
15.40	9	0	0%	220	0	0%
TOTAL	179	37	20.67%	290,323	250,073	86.14%
16.00 TEXTILE PRODUCTS						
16.01	0	0	0%	0	0	0%
16.02	0	0	0%	0	0	0%
16.03	0	0	0%	0	0	0%
16.04	0	0	0%	0	0	0%
16.05	3	1	33.33%	60	6	10.00%
16.06	0	0	0%	0	0	0%
16.07	0	0	0%	0	0	0%
16.08	0	0	0%	0	0	0%
16.09	0	0	0%	0	0	0%
16.10	304	17	5.59%	19,343	9,285	48.00%
16.11	0	0	0%	0	0	0%
16.12	0	0	0%	0	0	0%
16.13	0	0	0%	0	0	0%
16.14	1	0	0%	300	0	0%
16.15	3	3	100.00%	33	33	100.00%
16.16	0	0	0%	0	0	0%
16.17	0	0	0%	0	0	0%
16.40	3	3	100.00%	396	396	100.00%
TOTAL	314	24	7.64%	20,132	9,720	48.28%
17.00 MISCELLANEOUS						
17.01	0	0	0%	0	0	0%
17.02	0	0	0%	0	0	0%
17.03	60	6	10.00%	719	11	1.53%
17.04	3	0	0%	1,800	0	0%
17.05	0	0	0%	0	0	0%
17.06	0	0	0%	0	0	0%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
17.07	6	0	0%	46	0	0%
17.08	0	0	0%	0	0	0%
17.09	2	0	0%	8,523	0	0%
17.10	152	9	5.92%	8,971	692	7.71%
17.11	75	5	6.67%	21,508	6,015	27.97%
17.12	23	5	21.74%	1,188	237	19.95%
17.13	0	0	0%	0	0	0%
17.14	0	0	0%	0	0	0%
17.15	78	4	5.13%	3,301	1,050	31.81%
17.16	97	30	30.93%	6,324	1,722	27.23%
17.17	27	6	22.22%	50,778	20,604	40.58%
17.18	2	1	50.00%	408	108	26.47%
17.19	3	0	0%	128	0	0%
17.20	0	0	0%	0	0	0%
17.21	1	1	100.00%	217	217	100.00%
17.22	0	0	0%	0	0	0%
17.23	0	0	0%	0	0	0%
17.24	96	1	1.04%	63,368	3	.004%
17.40	70	0	0%	2,370	0	0%
TOTAL	695	68	9.78%	169,649	30,659	18.07%

ALL CATEGORIES

TOTAL	29,528	1,681	5.69%	6,710,495	764,132	11.39%
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DIVISION OF MEASUREMENT STANDARDS  
QUANTITY CONTROL  
SUB-CATEGORIES AND % DEFECTIVE REPORT  
3RD QUARTER - JULY THRU SEPTEMBER 1975

CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
1.00 CONFECTIONS & FLAVORINGS						
1.01	7	0	0%	89	0	0%
1.02	66	1	1.52%	12,870	2	.02%
1.03	55	2	3.64%	6,925	5	.07%
1.04	0	0	0%	0	0	0%
1.05	12	5	41.67%	849	19	2.24%
1.06	369	11	2.98%	54,228	13,481	24.86%
1.07	12	1	8.33%	306	53	17.32%
1.08	315	7	2.22%	17,011	1,245	7.32%
1.09	0	0	0%	0	0	0%
1.10	10	0	0%	2,000	0	0%
1.11	19	0	0%	2,695	0	0%
1.12	14	3	21.43%	584	67	11.47%
1.13	27	1	3.70%	1,150	9	.78%
1.14	202	14	6.93%	7,302	549	7.52%
1.15	4	1	25.00%	502	18	3.59%
1.16	20	0	0%	187	0	0%
1.40	20	2	10.00%	18,398	1,571	8.54%
TOTAL	1,152	48	4.17%	125,096	17,019	13.60%
2.00 DAIRY-TYPE PRODUCTS						
2.01	1	0	0%	30	0	0%
2.02	86	6	6.98%	27,721	208	.75%
2.03	116	7	6.03%	37,522	1,497	3.99%
2.04	347	17	4.90%	11,262	232	2.06%
2.05	621	21	3.38%	76,401	1,204	1.58%
2.06	2	1	50.00%	34	9	26.47%
2.07	139	8	5.76%	75,098	21,749	28.96%
2.08	49	0	0%	2,043	0	0%
2.09	4	0	0%	1,756	0	0%
2.10	0	0	0%	0	0	0%
2.11	11	0	0%	2,662	0	0%
2.12	21	0	0%	3,300	0	0%
2.13	798	42	5.26%	113,622	8,895	7.83%
2.14	28	7	25.00%	24,277	1,276	5.26%
2.15	6	3	50.00%	123	49	39.84%
2.16	1	1	100.00%	7	7	100.00%
2.17	15	0	0%	867	0	0%
2.40	3	1	33.33%	6,216	1,638	26.35%
2.50	1,522	30	1.97%	388,320	22,460	5.78%
TOTAL	3,770	144	3.82%	771,261	59,224	7.68%
3.00 BAKERY GOODS - CANNED, FRESH, OR FROZEN						
3.01	690	52	7.54%	50,694	943	1.86%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
3.02	8	0	0%	137	0	0%
3.03	12	6	50.00%	25,263	684	2.71%
3.04	83	10	12.05%	3,012	69	2.29%
3.05	30	0	0%	725	0	0%
3.06	210	9	4.29%	40,422	121	.30%
3.07	23	0	0%	3,319	0	0%
3.08	44	0	0%	3,274	0	0%
3.09	99	4	4.04%	9,219	76	.82%
3.10	54	1	1.85%	14,166	15	.11%
3.11	142	11	7.75%	37,167	1,004	2.70%
3.12	87	10	11.49%	333	42	12.61%
3.13	0	0	0%	0	0	0%
3.40	20	5	25.00%	191	41	21.47%
3.50	4,018	175	4.36%	298,709	10,133	3.39%
TOTAL	5,520	283	5.13%	486,631	13,128	2.70%

4.00 MEAT, FISH, POULTRY

4.01	112	2	1.79%	35,028	215	.61%
4.02	86	9	10.47%	7,874	667	8.47%
4.03	17	5	29.41%	1,733	423	24.41%
4.04	0	0	0%	8,537	2,851	33.40%
4.05	0	0	0%	31,217	205	.66%
4.06	0	0	0%	0	0	0%
4.07	0	0	0%	621	252	40.60%
4.08	0	0	0%	0	0	0%
4.09	0	0	0%	17,774	1,484	8.35%
4.10	0	0	0%	79,404	3,818	4.81%
4.11	0	0	0%	0	0	0%
4.12	0	0	0%	1,653	622	37.63%
4.13	0	0	0%	3,827	37	.97%
4.14	0	0	0%	206	0	0%
4.40	0	0	0%	25,894	875	3.38%
4.50	0	0	0%	1,742,845	17,845	1.02%
TOTAL	215	16	7.44%	1,956,613	29,294	1.50%

5.00 COOKING OILS, SALAD DRESSINGS, CONDIMENT

5.01	2	0	0%	300	0	0%
5.02	4	0	0%	1,944	0	0%
5.03	0	0	0%	0	0	0%
5.04	9	0	0%	3,642	0	0%
5.05	1	0	0%	90	0	0%
5.06	3	0	0%	1,002	0	0%
5.07	0	0	0%	0	0	0%
5.08	16	0	0%	1,272	0	0%
5.09	1	0	0%	400	0	0%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
5.10	4	0	0%	600	0	0%
5.40	26	0	0%	2,922	0	0%
TOTAL	66	0	0%	12,172	0	0%

6.00 MILLING PRODUCTS

6.01	79	3	3.80%	4,378	45	1.03%
6.02	0	0	0%	0	0	0%
6.03	0	0	0%	0	0	0%
6.04	0	0	0%	0	0	0%
6.05	29	2	6.90%	3,540	29	.82%
6.06	0	0	0%	9,686	907	9.36%
6.07	31	1	3.23%	684	5	.73%
6.08	449	27	6.01%	43,422	4,930	11.35%
6.09	42	6	14.29%	925	180	19.46%
6.40	34	12	35.29%	791	237	29.96%
TOTAL	664	51	7.68%	63,426	6,333	9.99%

7.00 PRODUCE

7.01	346	17	4.91%	35,770	2,236	6.25%
7.02	549	35	6.36%	504,381	108,843	21.58%
7.03	70	0	0%	5,358	0	0%
7.04	536	30	5.60%	386,824	5,876	1.52%
7.05	7	0	0%	243	0	0%
7.06	22	2	9.09%	550	19	3.45%
7.40	22	0	0%	681	0	0%
7.50	1,741	64	3.68%	266,404	4,798	1.80%
TOTAL	3,293	148	4.49%	1,200,211	121,772	10.15%

8.00 OTHER FOOD PREPARATIONS

8.01	0	0	0%	0	0	0%
8.02	3	0	0%	47	0	0%
8.03	47	1	2.13%	756	78	10.32%
8.04	0	0	0%	0	0	0%
8.05	64	1	1.56%	4,111	12	.29%
8.06	87	0	0%	24,976	0	0%
8.07	176	1	.57%	41,912	13	.03%
8.08	0	0	0%	0	0	0%
8.09	194	29	14.95%	654,392	51,247	7.83%
8.10	13	0	0%	304	0	0%
8.11	42	1	2.38%	8,470	7,776	91.80%
8.12	6	0	0%	297	0	0%



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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
8.40	526	20	3.80%	76,842	1,210	1.57%
TOTAL	1,158	53	4.58%	812,107	60,336	7.43%
9.00 BEVERAGES						
9.01	23	0	0%	24,500	0	0%
9.02	1	1	100.00%	10	10	100.00%
9.03	0	0	0%	0	0	0%
9.04	7	7	100.00%	128	128	100.00%
9.05	430	16	3.72%	1,063,496	56,736	5.33%
9.06	106	6	5.66%	456,367	94,132	20.63%
9.07	42	9	21.43%	25,552	4,485	17.55%
9.08	26	0	0%	2,675	0	0%
9.09	85	5	5.88%	463,971	1,270	.30%
9.10	60	9	15.00%	94,221	23	25.03%
9.11	5	0	0%	11,405	0	.01%
9.12	2	0	0%	36	0	0%
9.13	23	5	21.74%	1,212	317	26.16%
9.14	75	6	8.00%	12,559	47	.37%
9.15	8	0	0%	234	0	0%
9.16	28	0	0%	5,916	0	0%
9.17	14	2	14.29%	4,211	1,490	35.38%
9.18	36	2	5.56%	3,394	182	5.36%
9.40	4	0	0%	600	0	0%
TOTAL	975	68	6.97%	2,170,488	182,485	8.41%

10.00 PHARMACY PRODUCTS

10.01	0	0	0%	0	0	0%
10.02	0	0	0%	0	0	0%
10.03	0	0	0%	0	0	0%
10.04	5	0	0%	69	0	0%
10.05	14	0	0%	5,400	0	0%
10.06	3	0	0%	52	0	0%
10.07	34	2	5.85%	5,749	32	.54%
10.08	174	31	17.82%	137,891	72,910	52.88%
10.09	107	0	0%	2,389	0	0%
10.10	10	0	0%	200	0	0%
10.11	29	0	0%	9,653	0	0%
10.12	190	17	8.95%	68,904	20,372	29.57%
10.13	74	5	6.76%	61,744	19,152	31.02%
10.14	0	0	0%	0	0	0%
10.15	0	0	0%	0	0	0%
10.16	0	0	0%	0	0	0%
10.17	0	0	0%	0	0	0%
10.18	0	0	0%	0	0	0%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
10.19	0	0	0%	0	0	0%
10.40	50	2	4.00%	1,258	124	9.86%
TOTAL	690	57	8.26%	293,349	112,590	38.38%
11.00 GARDEN, FARM, PET SUPPLIES						
11.01	25	1	4.00%	15,182	6	.04%
11.02	9	0	0%	180	0	0%
11.03	2	0	0%	300	0	0%
11.04	0	0	0%	0	0	0%
11.05	37	0	0%	507	0	0%
11.06	33	8	24.24%	2,847	646	22.69%
11.07	31	2	6.45%	5,865	18	.31%
11.08	249	22	8.84%	26,868	8,934	33.25%
11.09	92	25	27.17%	10,762	2,407	22.37%
11.10	108	20	18.52%	3,683	869	23.56%
11.11	102	15	14.71%	11,137	833	7.48%
11.12	253	5	1.98%	59,375	260	.44%
11.13	64	11	17.19%	5,336	381	7.14%
11.14	76	2	2.63%	5,046	122	2.42%
11.15	16	1	6.25%	1,349	120	8.90%
11.16	62	0	0%	3,406	0	0%
11.17	64	0	0%	4,496	0	0%
11.18	4	0	0%	4	0	0%
11.40	35	2	5.71%	17,223	52	.30%
TOTAL	1,262	114	9.03%	173,571	14,646	8.44%

12.00 HARDWARE & BUILDING MATERIALS

12.01	66	0	0%	1,082	0	0%
12.02	42	0	0%	822	0	0%
12.03	5	1	20.00%	3,997	3,072	76.86%
12.04	0	0	0%	0	0	0%
12.05	0	0	0%	0	0	0%
12.06	7	0	0%	1,037	0	0%
12.07	27	3	11.11%	1,624	59	3.63%
12.08	12	0	0%	862	0	0%
12.09	7	0	0%	1,550	0	0%
12.10	107	5	4.67%	10,035	450	4.46%
12.11	10	0	0%	1,115	0	0%
12.12	12	0	0%	1,175	0	0%
12.13	0	0	0%	0	0	0%
12.14	0	0	0%	0	0	0%
12.15	1	1	100.00%	68	68	100.00%
12.16	12	1	8.33%	2,171	344	15.85%
12.17	68	23	33.82%	6,050	2,045	33.80%
12.18	0	0	0%	0	0	0%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
12.19	1	0	0%	8,000	0	0%
12.20	0	0	0%	0	0	0%
12.21	0	0	0%	0	0	0%
12.22	5	0	0%	390	0	0%
12.40	25	4	16.00%	1,450	51	3.52%
TOTAL	407	38	9.34%	41,478	6,089	14.68%
13.00 PAINT & ALLIED PRODUCTS						
13.01	456	3	.66%	30,453	706	2.32%
13.02	189	0	0%	11,119	0	0%
13.03	10	0	0%	200	0	0%
13.04	36	0	0%	2,025	0	0%
13.05	32	0	0%	2,975	0	0%
13.06	3	0	0%	200	0	0%
13.07	0	0	0%	0	0	0%
13.08	115	4	3.48%	13,861	1,594	11.50%
13.09	115	9	7.83%	27,162	11,971	44.07%
13.10	0	0	0%	0	0	0%
13.11	3	0	0%	750	0	0%
13.12	0	0	0%	0	0	0%
13.13	3	0	0%	600	0	0%
13.14	6	0	0%	1,000	0	0%
13.15	1	0	0%	35	0	0%
13.40	158	12	7.59%	27,797	1,664	5.99%
TOTAL	1,127	28	2.48%	118,177	15,935	13.48%
14.00 MAINTENANCE SUPPLIES						
14.01	12	0	0%	890	0	0%
14.02	1	0	0%	17	0	0%
14.03	137	18	13.14%	94,503	56,657	59.95%
14.04	42	0	0%	12,776	0	0%
14.05	7	1	14.29%	181	6	3.31%
14.06	162	4	2.47%	6,984	115	1.65%
14.07	0	0	0%	0	0	0%
14.08	0	0	0%	0	0	0%
14.09	0	0	0%	0	0	0%
14.10	0	0	0%	0	0	0%
14.11	0	0	0%	0	0	0%
14.12	1	0	0%	60	0	0%
14.13	92	1	1.07%	3,012	8	.27%
14.40	97	4	4.12%	13,909	124	.89%
TOTAL	551	28	5.08%	132,337	56,910	43.00%
15.00 PAPER PRODUCTS						
15.01	2	1	50.00%	111	11	9.91%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
15.02	85	22	25.88%	89,613	63,677	71.06%
15.03	1	0	0%	42	0	0%
15.04	35	6	17.14%	3,105	1,273	41.00%
15.05	0	0	0%	0	0	0%
15.06	1	0	0%	150	0	0%
15.07	0	0	0%	0	0	0%
15.08	25	0	0%	445	0	0%
15.09	0	0	0%	0	0	0%
15.10	6	2	33.33%	454	129	28.41%
15.11	2	2	100.00%	26,024	26,024	100.00%
15.12	0	0	0%	0	0	0%
15.13	75	8	10.67%	33,815	395	1.17%
15.14	0	0	0%	0	0	0%
15.15	2	0	0%	25	0	0%
15.40	34	15	44.12%	2,733	1,499	54.85%
TOTAL	268	56	20.90%	156,517	93,008	59.42%
16.00 TEXTILE PRODUCTS						
16.01	0	0	0%	0	0	0%
16.02	0	0	0%	0	0	0%
16.03	4	1	25.00%	614	64	10.42%
16.04	0	0	0%	0	0	0%
16.05	0	0	0%	0	0	0%
16.06	0	0	0%	0	0	0%
16.07	0	0	0%	0	0	0%
16.08	0	0	0%	0	0	0%
16.09	2	1	50.00%	176	116	65.91%
16.10	188	7	3.72%	3,468	105	3.03%
16.11	8	0	0%	97	0	0%
16.12	0	0	0%	0	0	0%
16.13	0	0	0%	0	0	0%
16.14	25	9	36.00%	1,863	221	11.86%
16.15	2	1	50.00%	817	260	31.82%
16.16	0	0	0%	0	0	0%
16.17	0	0	0%	0	0	0%
16.40	17	1	5.88%	701	64	9.13%
TOTAL	246	20	8.13%	7,736	830	10.73%
17.00 MISCELLANEOUS						
17.01	1	0	0%	30	0	0%
17.02	0	0	0%	0	0	0%
17.03	53	0	0%	4,172	0	0%
17.04	0	0	0%	0	0	0%

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CODE	TOTAL LOTS	LOTS REJECTED	% LOTS REJECTED	TOTAL PACKAGES	PACKAGES REJECTED	% PACKAGES REJECTED
17.05	47	0	0%	2,748	0	0%
17.06	0	0	0%	0	0	0%
17.07	12	0	0%	75	0	0%
17.08	0	0	0%	0	0	0%
17.09	24	0	0%	185	0	0%
17.10	21	0	0%	1,918	0	0%
17.11	24	0	0%	3,106	0	0%
17.12	9	1	11.11%	138	8	5.80%
17.13	1	0	0%	55	0	0%
17.14	0	0	0%	0	0	0%
17.15	5	3	60.00%	2,152	1,107	51.44%
17.16	167	57	34.13%	5,729	2,981	52.03%
17.17	9	0	0%	9,356	0	0%
17.18	6	1	16.67%	538	60	11.15%
17.19	3	2	66.67%	39	24	61.54%
17.20	2	0	0%	30	0	0%
17.21	3	0	0%	185	0	0%
17.22	1	0	0%	24	0	0%
17.23	0	0	0%	0	0	0%
17.24	27	1	3.70%	4,139	324	7.83%
17.40	31	4	12.90%	3,687	312	8.46%
TOTAL	446	69	15.47%	38,306	4,816	12.57%
ALL CATEGORIES						
TOTAL	21,810	1,221	5.60%	8,559,476	794,417	9.28%

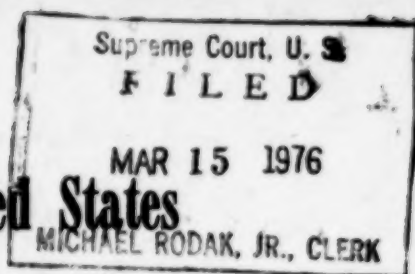
STATISTICS COMPILED FROM  
DIVISION OF MEASUREMENT  
STANDARDS, QUANTITY CONTROL  
SUB-CATEGORIES AND % DEFECTIVE REPORT  
(JULY 1972 - SEPTEMBER 1975)

Chicken fresh and frozen - 4.12 (code)

July 1972	June 1973	24,159	3,246	13.43
July 1973	June 1974	21,829	7,945	36.40
July 1974	Dec. 1974	19,561	8,774	44.85
Jan. 1975	Sept. 1975	7,609	2,448	32.17



IN THE  
**Supreme Court of the United States**



October Term, 1975  
No. 75-1053

JOSEPH W. JONES, as Director of the County of River-  
side, California, Department of Weights and Meas-  
ures,  
*Petitioner,*

vs.

GENERAL MILLS, INC., a corporation; THE PILLSBURY  
COMPANY, a corporation; SEABOARD ALLIED MILLING  
CORPORATION, a corporation,  
*Respondents.*

**Brief of 33 States and Attorneys General as Amici  
Curiae in Support of Petitioner Joseph W. Jones**

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IN THE  
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JOSEPH W. JONES, as Director of the County of Riverside, California, Department of Weights and Measures,  
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GENERAL MILLS, INC., a corporation; THE PILLSBURY COMPANY, a corporation; SEABOARD ALLIED MILLING CORPORATION, a corporation,  
*Respondents.*

**Brief of 33 States and Attorneys General as Amici Curiae in Support of Petitioner Joseph W. Jones**

**JURISDICTIONAL STATEMENT**

This brief, amicus curiae, is respectfully submitted by the following 33 States, State Officers, and Attorneys General pursuant to Rules 42(1) and (4) of this Court: Avrum Gross, Attorney General of **Alaska**; Bruce E. Babbitt, Attorney General of **Arizona**; Jim Guy Tucker, Attorney General of **Arkansas**; Evelle J. Younger, Attorney General of **California** and L. T. Wallace, Director of the California Department of Food and Agriculture; Richard R. Wier, Jr., Attorney General of **Delaware**; Robert L. Shevin, Attorney General of **Florida** and Doyle Conner, Florida Commissioner of Agriculture; The State of **Georgia**; Wayne L. Kidwell, Attorney General of **Idaho** and Idaho Department of Agriculture;

William J. Scott, Attorney General of **Illinois**; Curt T. Schneider, Attorney General of **Kansas**; Robert F. Stephens, Attorney General of **Kentucky**; The State of **Louisiana**, Department of Justice, William J. Guste, Jr., Attorney General; The State of **Maine**, by Joseph E. Brennan, Attorney General; Francis B. Burch, Attorney General of **Maryland**; The Commonwealth of **Massachusetts**, Francis X. Bellotti, Attorney General; The State of **Mississippi**, by A. F. Summer, Attorney General; Robert L. Woodahl, Attorney General of **Montana**; Paul L. Douglas, Attorney General of **Nebraska**; Robert List, Attorney General of **Nevada**; Toney Anaya, Attorney General of **New Mexico**; Louis J. Lefkowitz, Attorney General of **New York**; William J. Brown, Attorney General of **Ohio** and John M. Stackhouse, Director, Ohio Department of Agriculture; The State of **Oklahoma**, ex rel. Larry Derryberry, Attorney General; The State of **Oregon**; The Commonwealth of **Pennsylvania**, Department of Agriculture, Raymond J. Kerstetter, Acting Secretary; Daniel R. McLeod, Attorney General of **South Carolina**; William J. Janklow, Attorney General of **South Dakota**; John L. Hill, Attorney General of **Texas**; Vernon B. Romney, Attorney General of **Utah**; The Commonwealth of **Virginia**, Virginia Department of Agriculture and Commerce, by Andrew P. Miller, Attorney General; **Washington** State Department of Agriculture by Slade Gorton, Attorney General; Chauncey H. Browning, Jr., Attorney General of **West Virginia**; V. Frank Mendicino, Attorney General of **Wyoming**. (Amici curiae are sometimes referred to *infra* as States.)

The States, organizations and law enforcement officers listed in footnote 1 have authorized amici to advise the Court that they support the granting of certiorari.<sup>1</sup>

<sup>1</sup>The following jurisdictions and organizations support the granting of certiorari in this case.

*States:*

Carl R. Ajello, Attorney General of Connecticut; and The State of Hawaii, John Farias, Jr. as Chairman of the Board of Agriculture, George Mattimoe, Deputy Director.

*National Organizations:*

American Farm Bureau Federation, National Association of Retail Grocers of the U.S., Inc. (NARGUS represents more than 120,000 retail stores which sell approximately one-half (or fifty billion dollars) of the value of retail sales of food and consumer commodities in the United States); National Conference on Weights and Measures; National Consumers Congress; National Grange (The American Farm Bureau Federation and the National Grange together have as members the majority of America's farmers); National Scale Men's Association; Scale Manufacturers Association, Inc.

*Regional and State Organizations:*

Associated Dairymen (California); Associated Milk Producers, Inc.; California Association of Weights and Measures Officials; California Cattlemen's Association; California Citizen Action Group; California Farm Bureau Federation; California State Grange; Consolidated Milk Producers for San Francisco; Consolidated Milk Producers of Tulare County (California); Consumers Cooperative of Berkeley, Inc.; Federated Dairymen (California); Greenbelt Consumer Services, Inc., Silver Springs, Maryland; Hanover (New Hampshire) Consumer Cooperative Society, Inc.; League of California Milk Producers; Mid-America Dairy-men, Inc. (Missouri); Milk Producers Council (California); Producers' Market Milk Association (California); Western Dairy-men's Association (California).

*California Law Enforcement Officers:*

D. Lowell Jensen, District Attorney, Alameda County; Thomas L. Kelly, District Attorney, Alpine County; Guy E. Reynolds, District Attorney, Amador County; Kenneth H. Leach, District Attorney, Butte County; Joseph W. Kiley, District Attorney, Calaveras County; Robert W. Weir, District Attorney, Del Norte; Terrence M. Finney, District Attorney, El Dorado County; Noble Sprunger, County Counsel, El Dorado County; William A. Smith, District Attorney, Fresno County; L. H. Gibbons, District Attorney, Inyo County; Ralph B. Jordan, County Counsel, Kern County; Albert M. Leddy, District Attorney, Kern County; Harold L. Abbott, District Attorney, Lassen County; John K. Van de Kamp, District Attorney, Los Angeles County;

(This footnote is continued on next page)



## INTEREST OF AMICI CURIAE

The 33 States which join in this brief represent more than 140 million of our nation's 212 million citizens, every demographic and geographic region. We grow 70 percent of our nation's agricultural output and produce a similar percentage of our nation's other goods, and services. We both ship to other states and import from them mammoth quantities of goods. We are vitally concerned with assuring our consumers, and all of our nation's farmers, manufacturers and distributors, a truly free and honestly competitive marketplace as this promotes the well-being and prosperity of our citizens and business people. A keystone of

Bruce Bales, District Attorney, Marin County; Douglas J. Maloney, County Counsel, Marin County; Duncan M. James, District Attorney, Mendocino County; Russell M. Koch, County Counsel, Merced County; John P. Baker, District Attorney, Modoc County; James D. Boitano, District Attorney, Napa County; Ronald L. MacMiller, District Attorney, Nevada County; Cecil Hicks, District Attorney, Orange County; Gerald E. Flanagan, District Attorney, Plumas County; Byron C. Morton, District Attorney, Riverside County; John M. Price, District Attorney, Sacramento County; Edwin L. Miller, Jr., District Attorney, San Diego County; Joseph Freitas, District Attorney, City and County of San Francisco; Joseph H. Baker, District Attorney, San Joaquin County; Robert N. Tait, District Attorney, San Luis Obispo County; Keith C. Sorensen, District Attorney, San Mateo County; James M. Cramer, District Attorney, San Bernardino County; Stanley M. Roden, District Attorney, Santa Barbara County; Louis P. Bergna, District Attorney, Santa Clara County; Christopher C. Cottle, District Attorney, Santa Cruz County; Robert A. Rehberg, County Counsel, Shasta County; Robert W. Baker, District Attorney, Shasta County; Gene L. Tunney, District Attorney, Sonoma County; Donald N. Stahl, District Attorney, Stanislaus County; Edward F. Buckner, County Counsel, Sutter County; H. Ted Hansen, District Attorney, Sutter County; Henry J. Goff, Jr., District Attorney, Tehama County; Calvin E. Baldwin, County Counsel, Tulare County; J. W. Powell, District Attorney, Tulare County; Stephen Dietrich Jr., County Counsel, Tuolumne County; C. Stanley Trom, District Attorney, Ventura County; Bartley C. Williams, District Attorney, Yuba County.

our commercial system is an honest, accurate and effective weights and measures system. To achieve these ends our Legislatures have enacted, and we enforce, laws requiring that representations made on packaged food commodities must be true and not misleading—that there be no fraud in the marketplace.

Our actions in the weights and measures field are not of recent origin, nor has their importance been unrecognized by this Court. They began prior to ratification of our Federal Constitution and received explicit approval by this Court at least as early as 1897.

"Where the subject is of wide importance to the community, the consequences of fraudulent practices generally injurious, and the suppression of such frauds matter of public concern, it is within the protective power of the State to intervene. *Laws providing for the inspection and grading of flour, the inspection and regulation of weights and measures*, the weighing of coal on public scales, and the like, are all competent exercises of that power. . . ." *Patapsco Guano Co. v. North Carolina*, 171 U.S. 345, 358 (1897). (Emphasis added.)

No modern society built upon free competition among private businesses can long survive without effective enforcement of weights and measures laws. Yet in the face of recognition by this Court of the historic and crucial role of the States in assuring consumers and competitors of honest weights and measures, the court below invalidated California laws designed to

implement this reserved power of the States, ignoring the Second Circuit's earlier affirmance of such State authority.

Of compelling concern to amici curiae is the adverse impact which the decision of the Ninth Circuit, if not reversed, could have upon the power of the States in forbidding false representations in the marketplace and in preventing the detrimental consequences thereof to both consumers and honest businesses. More broadly stated, the issue presented is whether the Ninth Circuit has improperly denied California and its sister States their inherent power to protect the welfare of their citizens and to assure them free and honestly competitive markets.

The vital issue presented to this Court for resolution is the power of the States to prevent fraud in the marketplace by requiring true statements of weight on commodities sold to consumers.

Amici curiae have substantial interests in the resolution of this matter.

## REASONS FOR GRANTING THE WRIT

### 1. THE COURT OF APPEALS MISCONSTRUES PRINCIPLES OF LAW ENUNCIATED IN PRIOR DECISIONS OF THIS COURT; ITS DECISION DEPRIVES CALIFORNIA AND ITS SISTER STATES OF THEIR SOVEREIGN AUTHORITY TO PROTECT THE HEALTH AND WELFARE OF THEIR CITIZENS

#### A. The Ninth Circuit's Preemption Holding Conflicts With Principles Established in Prior Decisions of This Court

##### (1) The Ninth Circuit's Argument

The court below reached its conclusion that California's laws<sup>2</sup> are preempted by the federal Food, Drug and Cosmetic Act, 21 U.S.C. section 301 *et seq.* (FDCA) and by the federal Fair Packaging and Labeling Act, 15 U.S.C. section 1451 *et seq.* (FPLA) upon the following reasoning.

First, there is "no unmistakable Congressional mandate that the FDCA and FPLA exclude weights and measures regulations by the States which impose standards which differ from the federal standards. . . ."<sup>3</sup>

<sup>2</sup>1963 Calif. Stats., ch. 353, California Business and Professions Code section 12211, and 4 California Administrative Code, ch. 8, subch. 2, Article 5. The text of these laws is set out at pp. 69-90 of the Appendix to the Petition for Certiorari filed by Joseph W. Jones (hereinafter Pet. Appx., p. ....).

<sup>3</sup>The court expressly recognizes that weights and measures regulation (1) is "normally" within the exercise of the States' police powers, (2) is not a subject demanding exclusive federal regulation, and (3) the FDCA contains no express preemptive language and its legislative history "shows a regard in the Congress for the exercise of State police power" (quoting from the House Report on the first Food and Drug Act: "It is not proposed by the bill to interfere in any way with the power of the State officials over local trade. . . .") (Pet. Appx., p. 45.)



(Pet. Appx., p. 44.) (This unqualified statement by the court that there is no express preemption of State weights and measures laws is immediately contradicted.)

Second, section 12 of the FPLA<sup>4</sup> expressly preempts State laws to the extent they are less stringent than the FPLA requirement, which, as stated in 15 U.S.C. section 1453, is that labels must “separately and accurately state the net quantity of contents. This preemption is not merely of *labeling* requirements (type size, placement, etc.) but extends to the *accuracy* of label statements as well. (Pet. Appx., pp. 45, 46.)

Third, the test to be applied is “whether California’s scheme impermissibly *conflicts* with federal law. This is an inquiry different from that where express preemption is involved.” [Citation omitted.] (Pet. Appx., p. 46.)

Fourth, the California laws set a standard both *different than* the FDCA reasonable-shortage-in-each-package requirement and *less stringent than* the FPLA accuracy-in-each-package requirement.

Therefore the California laws do “impermissibly conflict with the standards imposed by” the FDCA and FPLA.<sup>5</sup> (Pet. Appx., p. 52.)

<sup>4</sup>15 U.S.C. section 1461. The text of this section is set out, *infra*, at p. 9.

The court reaches its conclusion that FPLA preempts state laws regulating label *accuracy* as well as *format* even though it takes pains to quote the legislative history of this section and characterizes this language as standing for *no* Congressional intent to restrict the authority of the States. (Pet. Appx., p. 46.) (See, *infra*, at pp. 9-10.)

<sup>5</sup>It is possible to conclude from Part III of the court’s opinion that the State laws in issue are preempted only by the FPLA and not by the FDCA. However, the court’s emphatic declaration in Part V of its opinion is that both federal laws are offended. If the latter is indeed the case, the circuit court’s

In the following sections amici demonstrate the manifold errors of the circuit court’s analysis—its misinterpretation of the federal laws, misapplication of the “impermissible conflict” test of preemption, and the serious, adverse consequences of the circuit court’s ruling.

## (2) The Circuit Court Misconstrued the Federal Law

The court below twice erred in its construction of the FPLA.<sup>6</sup>

First, the court misinterprets section 12 of the FPLA, 15 U.S.C. section 1461, as preempting state laws regulating *accuracy* of label statements at time of sale as well as their *form*. (See Pet. Appx., p. 45.)

15 U.S.C. section 1461 provides:

“It is hereby declared that it is the express intent of Congress to supersede any and all laws of the States or political subdivisions thereof insofar as they may now or hereafter provide for the *labeling* of the net quantity of contents of the package of any consumer commodity covered by this chapter which are less stringent than or require information different from the requirements of section 1453 of this title or regulations promulgated pursuant thereto.” (Emphasis added.)

holding is contrary to (1) *Corn Products Refg. Co. v. Eddy*, 249 U.S. 427 (1918), which held that State laws were not preempted by the FDCA, and (2) a proper analysis of the FPLA. (See, *infra*, at pp. 9-10.)

<sup>6</sup>As the problems with circuit court’s interpretation of the FDCA arise from its misapplication of the preemption test and not from construction of the express terms of that law, discussion of the FDCA is deferred to subsection 4, *infra*, at pp. 17-18.



Thus this preemption provision is expressly limited to the *manner* of labeling of net quantity statements (*i.e.*, type size and placement), and does not purport to regulate the *accuracy* of that information. The *accuracy* of such labeling is covered in another section of this Act, 15 U.S.C. section 1453(a)(2), which contains no preemptive language. *Cf. Atlantic Ocean Products, Inc. v. Leth*, 292 F.Supp. 615 (USDC, D. Oregon, 1968), *aff'd*, 393 U.S. 127 (1968), in which the court held that section 1461 did not preclude the State of Oregon from regulating product names even though the descriptive name used was part of the package label.

The interpretation advanced by amici harmonizes the purposes of this federal act—to enhance both fair competition and consumer protection—with the power of the States to assure honest weights and measures. By contrast, the construction of section 1461 claimed by the court below, as preempting “less stringent” state laws which regulate accuracy of label information, needlessly frustrates the long recognized police power of the States and must therefore be rejected.<sup>7</sup>

Second, the court erroneously concludes that federal law does not permit use of a lot sampling procedure to determine accuracy of label weight statements even

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<sup>7</sup>The Act's legislative history fully supports this limitation of preemption: “Section 12 [of the Bill, 15 U.S.C. § 1461] provides that regulations promulgated under the act shall supersede State law only to the extent that the States impose net quantity of contents *labeling* requirements which differ from requirements imposed under the terms of the act. The bill is *not intended to limit the authority of the States to establish* such packaging and labeling *standards* as they deem necessary

though the procedure is statistically valid and is based upon principles promulgated for the States' use by the National Bureau of Standards.

In such a procedure the accuracy of label weight statements of a group (lot) of homogeneous product bearing the same marked weight is determined by inspection of a portion (sample) of the packages which comprise the lot.

As promulgated by the National Bureau of Standards this procedure has three key elements: (1) individual packages are permitted reasonable variations (both plus and minus), (2) the lot is considered to meet the statutory standard so long as its average weight is at least the weight stated upon the packages, and (3) packagers are permitted to overpack to compensate for unavoidable variations in weight due to loss of moisture.

The California regulation (Article 5), which the trial court found to be statistically valid but use of which it and the Ninth Circuit nevertheless enjoined, possesses all of these elements.

The circuit court's holding is of substantial concern to amici as we (1) use either Article 5 or a similar lot averaging procedure in evaluating compliance with the statutory standard of true weight and (2) devote

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in response to State and local needs.” (Emphasis added.) Senate Report No. 1186, 3 U.S. Congressional and Administrative News (1966) p. 4069 at 4077, and see the list of labeling problems sought to be remedied at p. 4071—each of which is concerned with *form* and *not accuracy* of weight at time of sale.

our limited resources to taking action against lots which are short weight, rather than over weight.

Each of the principles which we use and each of those principles which the court below found objectionable has its basis in the procedures developed at the National Bureau of Standards and published by the Secretary of Commerce pursuant to 15 U.S.C. section 272. (United States Department of Commerce, National Bureau of Standards, Handbook 67, Checking Pre-packaged Commodities, 1959.) (The text of Handbook 67 is set forth in the Appendix to this brief, commencing at p. 3.) The principles set out in this publication were adopted after thorough consultation with the packaging industry, have been in use for seventeen years and have been applied to billions of packages.

Handbook 67 specifically authorizes weight to be determined on an average basis, requires packers to overfill such commodities as are susceptible of moisture loss, and recommends legal action only when the *average* weight of the lot is *less than* the standard required.

Similar statistical procedures utilizing the accuracy-on-the-average procedure are used by federal agencies to determine compliance with statutory standards calling for absolute accuracy in each item. For example, the United States Department of Agriculture and Environmental Protection Administration (EPA) have interpreted a statute which requires that label statements of weight be accurate, subject to regulations which permit reasonable variations, and thus similar to those at issue, to require accurate-weight-on-the-average. 40 C.F.R. §162.104. (Appx., *infra*, at pp. 2-3.)

Both the EPA regulation and Handbook 67 require that commodities subject to moisture loss be packaged

so that the statement of net contents will be correct *when the product is purchased*. 40 C.F.R. section 162.104(e), Handbook 67, p. 8, § 8, Step 3. (Appx., *infra*, at pp. 3 and 15.) *It is anomalous indeed that USDA required and EPA now requires that purchasers of poisons get true weight, while the court below sanctions short weight in food products.*

The policies in favor of the procedures utilized by petitioner are persuasive. While it is clear that the standard which petitioner enforces is true weight to the consumer (the same standard as is required by the FPLA (15 U.S.C. 1453(a)(2), *accord* opinion below (Pet. Appx., p. 47)), it is equally obvious that not even all of the resources of all of this nation's weights and measures officials combined would be sufficient to inspect each package of every commodity produced which bears a weight representation. Rather, adherence to this truth in labeling standard depends upon the good faith packers—encouraged by enforcement. It is equally apparent that a procedure which enables a weights and measures official to determine with substantial accuracy the weight of thousands of packages by inspecting only a portion of those packages meets both the packer's right to fair treatment and the enforcement official's time and budgetary constraints. No right-thinking person would insist upon package by package inspection of a lot of 5,000 packages when modern statistics provides what the district court found be to be a valid procedure to determine the weight of those packages by weighing only a sample. Thus, when a federal or State statute calls for accuracy and when a large number of packages must be inspected



for compliance with that standard, it is logical and practical and fair to enforce that standard by use of a valid statistical procedure which utilizes an accuracy-on-the-average standard. The circuit court's rejection of this approach is, therefore, misconceived.

The court's other major objection to the procedure under discussion is similarly unfounded. The court finds objectionable that Jones takes enforcement action against only those lots of product which he validly determines to be short weight; the court would have him also order removed from sale over weight lots as well. (Pet. Appx., pp. 48, 49 and 51.) As an enforcement procedure this is hardly prudent or sensible. It does not help consumers and is expensive for packagers. And such a view is directly contrary to that of the National Bureau of Standards, the agency charged by Congress with developing appropriate weights and measures enforcement procedures. 15 U.S.C. 272. (Appx., *infra*, p. 15.)

Thus, the ruling by the court below that a valid statistical procedure may not be used as an enforcement tool is contrary to logic, policy, published federal regulations dependent upon construction of similar statutes, and to procedures promulgated by the federal agency charged with expertise in this field. The impact of the court's ruling is to frustrate not only weights and measures enforcement but use of all statistical sampling procedures for compliance with innumerable laws.<sup>8</sup>

<sup>8</sup>By virtue of 15 U.S.C., § 1460 the court held that compliance with the FDCA excused compliance with the stricter FPLA standard. This construction is also questionable in light

### (3) The Court Below Misconstrued State Laws

The court below enjoined use of California Business and Professions Code section 12211 and its testing procedure (Article 5)<sup>9</sup> because (1) California law evaluates compliance with a true weight standard by means of a lot averaging procedure, (2) petitioner orders off sale only those lots in which the actual weight is less than the label weight, and (3) California evaluates all variations on a statistical basis. (Pet. App., pp. 47-50.) For the reasons set forth in subsection 2, *supra*, the circuit court erred.

In addition to the erroneous conclusions that federal law precludes use of a lot averaging procedure and that federal law demands removal from sale of over weight packages, the court below is equally wrong in condemning California's treatment of variations. The court objects to consideration of variations solely on a statistical basis. (Pet. Appx., p. 48.) Yet no statistical sampling procedure and no weighing device can determine the *cause* of a discrepancy from label weight.

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of 15 U.S.C. section 1456. This section makes subject to the misbranding provisions of the FDCA, 21 U.S.C. §§ 331-337, any consumer commodity which is a food, drug, device or cosmetic. An at least equally plausible construction of § 1460 is that the more stringent standards of FPLA are to be applied to commodities subject to regulation by both FPLA and FDCA.

<sup>9</sup>California Business and Professions Code section 12211 requires that each "sealer" (weights and measures official) weigh packages "in order to determine whether [they] contain the quantity or amount represented . . ." and permits the California Director of Food and Agriculture to adopt regulations for the accomplishment of this objective "provided, that the average weight or measure of the packages . . . in a lot . . . sampled shall not be less . . . than the net weight or measure stated upon the package. . . ." The Director

(This footnote is continued on next page)



The circuit court would have the inspector who finds a package short weight determine the cause—underfill, loss of moisture, other causes—and then determine what part of the shortage is due to what cause, and finally decide whether the shortage is “reasonable” for that product in that packaging material. This is impossible. The inspector can know the amount of shortage but cannot know why or whether the shortage is “reasonable.” *To require the impossible is to end effective weights and measures enforcement.*

The court’s criticism of Article 5 is in fact a condemnation of all statistical sampling plans. For the reasons set forth above, this conclusion is a major step backward, in derogation of logic and practicality and in conflict with the well-reasoned, contrary conclusion of the National Bureau of Standards, the federal agency with recognized expertise in this field.<sup>10</sup>

adopted such a uniform testing procedure (Article 5) which the district court held to be statistically valid. 357 F.Supp. 529 at 533; Pet. Appx., p. 57.

<sup>10</sup>Amici take exception to much of the reasoning utilized by the court below. Among the other errors in the circuit court’s opinion is its analysis of California Business and Professions Code §§ 12607 and 12614. (Pet. Appx., pp. 47-48 and 49-50.) At this point in its opinion the court attempts to show that the standard established by § 12607 is less stringent than the federal standard for the reason that § 12614 expressly recognizes causes for variations in addition to those permitted by the federal regulation. There is at least one flaw in the court’s analysis: § 12614 was repealed four years before the complaint in this action was filed. 1969 Calif. Stats. ch. 1309, p. 2643 § 2.

While the court concludes that § 12613 prevails over § 12614 (Pet. Appx., p. 49) and thus its failure to observe the repeal of the other statute is not crucial to the court’s holding, the erroneous conclusion is indicative of the circuit court’s errors of analysis and its disfavor of State activity in a field of historic State concern.

**(4) The Ninth Circuit Misapplied the Preemption Tests Enunciated by This Court**

As set forth in subsection (1), *supra*, the circuit court finds that the FPLA and FDCA do not expressly preempt State laws and that the inquiry to be made is whether California law impermissibly conflicts with federal law. (See Pet. Appx., p. 46.)

However, in the discussion which follows this statement the court below uses an express preemption analysis, concluding that the questioned State statutes are both different than the FDCA and less stringent than the FPLA. Amici have set forth, *supra*, the reasons why these conclusions must be rejected. What is crucial at this point is, rather, that the court below does *not* apply the implied preemption test, which it stated is necessary.

As this Court has repeatedly stated, preemption is to be implied only where there is a direct and positive conflict between the state and federal objective—where the challenged state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), and “only where the repugnance or conflict is so ‘direct and positive’ that the two acts cannot be reconciled or consistently stand together.” *Kelly v. Washington*, 30 U.S. 1, 10 (1937).

Assuming, *arguendo*, there be a conflict between California and federal laws, it does not approach the direct and positive clash which is a necessary predicate to a holding of preemption. As interpreted by the circuit court, both federal and California laws seek to insure accuracy in package weight representations. Even if we accept the circuit court’s criticisms

of the California laws, their differences from their federal counterparts do not stand as an obstacle to achievement of the Congressional purpose. Whatever differences there may be, compliance with both state and federal law is not impossible or even difficult. Indeed the circuit court's principal criticisms relate to California's use of a statistically sound testing procedure which is in principle identical to a similar procedure promulgated by the National Bureau of Standards.

Once this fundamental error in the Ninth Circuit's analysis is pointed out, all possibilities of finding the requisite irreconcilable conflict in purpose and effect disappear. The court below simply errs when it claims there is implied preemption merely because the State law is not in all respects identical to the federal, even if it is assumed, *arguendo*, that its interpretation of federal law is correct.

The court's error is particularly egregious as petitioner's activity is in a field which is historically one of local concern and one which is recognized by this Court as a competent exercise of its police power. *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 144 (1962); *Patapsco Guano Co. v. North Carolina*, 171 U.S. 345, 358 (1897).

Thus, amici contend that the circuit court improperly weighed the factors involved and reached a conclusion in direct conflict with principles enunciated in prior rulings of this Court.

## **B. The Decision Below Deprives California of Its Sovereign Police Power**

The discussion in the previous section assumed, for the sake of argument, that Congress has a right to legislate in the area of consumer protection. As will be demonstrated, *infra*, however, this assumption is by no means unqualified.

While it is manifest that the purpose of the FDCA and the FPLA is to inform and protect consumers from misbranded products (*e.g.*, *United States v. Kocmond*, 200 F.2d 370 (7th Cir. 1952); *United States v. Sullivan*, 332 U.S. 689, 696 (1947)), these laws clearly operate in a field which is traditionally and necessarily one of local concern and subject to independent state regulation (*e.g.*, *Corn Products Refg. Co. v. Eddy*, 249 U.S. 427, 431-33 (1918)).

The police power of the States necessarily includes the power to prevent deception of consumers. As this Court said almost 20 years ago:

"Where the subject is of wide importance to the community, the consequences of fraudulent practices generally injurious, and the suppression of such frauds matter of public concern, it is within the protective power of the State to intervene. Laws providing for the inspection and grading of flour, the inspection and regulation of weights and measures, the weighing of coal on public scales, and the like, are all competent exercises of that power. . . ." *Patapsco Guano Co. v. North Carolina*, 171 U.S. 345, 358 (1897).



And as more recently stated in *Florida Lime and Avocado Growers v. Paul*, 373 U.S. 132, 144 (1962):

“[T]he supervision of the readying of foodstuffs for market has always been deemed a matter of peculiarly local concern. . . . [T]he States have always possessed a legitimate interest in ‘the protection of . . . [their] people against fraud and deception in the sale of food products at retail markets within their borders.’” [Citations omitted.]

No section or clause of our federal Constitution relinquishes this police power of the States. And the Tenth Amendment specifically reserves to the States all powers not delegated to the United States by the Constitution, nor prohibited by it to the States.

Indeed, in light of the legislative history of the FPLA,<sup>11</sup> it should be clear that Congress did not intend the restriction upon the power of the States which is imposed by the court below.

Even had Congress intended to restrict the power of the States in this field it could not have constitutionally done so.

Nowhere in our Constitution is the police power of the States expressly or impliedly relinquished; and in light of *Patapsco Guano, supra*, and *Florida Lime and Avocado Growers, supra*, amici urge that this Court has specifically affirmed the police power of the States in this field, *especially when the challenged*

<sup>11</sup>“ . . . The bill is not intended to limit the authority of the States to establish such packaging and labeling standards as they deem necessary in response to State and local needs.” (Senate Report No. 1186, 3 U.S. Code, Congressional and Administrative News, p. 4069 at p. 4077 (1966).)

*State laws impose standards more stringent than those of federal law.* (See Pet. Appx., p. 48.)

To all of the States, the consequences of the Ninth Circuit’s ruling are devastating; if this ruling is permitted to stand the States will be unable to prevent the sale of foodstuffs which are falsely labeled.

The conflict of the ruling below with the sovereign authority of the States to prevent fraud in the marketplace justifies the grant of certiorari.

## 2. THE NINTH CIRCUIT’S REINSTATEMENT OF THE VAGUE FEDERAL REGULATION IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

In Part II of its opinion (Pet. Appx., pp. 42-44) the circuit court holds that the trial court erred when it found 21 C.F.R. 1.8(b)(q) was invalid for the reason that “Section 1.8b(q) suffers from the same infirmity as did 9 C.F.R. 317.2(h)(2) in the *Rath* . . . case. [*Rath v. Becker*, ..... F.2d ..... (9th Cir. October 29, 1975) petition for cert. filed *sub nom. Wallace, et al. v. The Rath Packing Company*, 44 USLW 3440 (No. 75-1052)]. The Secretary has failed to express tolerances which may be the ‘reasonable variations’ of the regulation. Without such an expression from the Secretary each enforcement officer is left to his own personal standard of what is reasonable.” *General Mills v. Jones*, USDC C.D. Cal. 1973, reported at ..... F.2d ..... (Pet. Appx., p. 54.)

As did the court below, amici must necessarily refer to Part II of that court’s opinion in *Rath* (Pet. Appx., pp. 18-26) which contains the court’s analysis of 9 C.F.R. 317.2(h)(2), promulgated by the Secretary of Agriculture as a purported guide to enforcement of



the Wholesome Meat Act, 21 U.S.C. section 601, *et seq.*

21 C.F.R. 1.8(b)(q) provides:

"The declaration of net quantity of contents shall express an accurate statement of the quantity of contents of the package. Reasonable variations caused by loss or gain of moisture during the course of good distribution practice or by unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large."

The vagueness of the instant regulation as interpreted by the circuit court is manifest. The court below interprets this regulation as permitting "reasonable variations," *i.e.*, that each package may be short weight by an unstated amount. Yet nowhere in the regulation is there definition of the phrases (1) "good distribution practices," (2) "unavoidable deviations," (3) "good manufacturing practices," or (4) "reasonable variations."

The invalidity of this regulation is demonstrated by consideration of the decisions of this Court in the field of economic regulation. In *United States v. Cohen Grocery Co.*, 225 U.S. 81 (1920), this Court found to be void for vagueness a statute which made it "unlawful for any person willfully . . . to make an *unjust* or *unreasonable* rate or charge in handling or dealing in or with any necessities." (Emphasis added.) *Id.* at 86.

And in *United States v. National Dairy Corp.*, 372 U.S. 29 (1962), in upholding section 3 of the Robinson Patman Act, 15 U.S.C. section 139, which makes

it a crime to sell goods at "unreasonably low prices for the purpose of destroying competition or eliminating a competitor," this Court distinguished *Cohen* from *National Dairy* as "the standard held to be too vague in *Cohen* was without a meaningful referent in business practice of usage" while the statute at issue in *National Dairy* addressed a specific business practice. *Id.* at 36.

The teaching of *Cohen* and *National Dairy* is that the vagueness of a particular law turns upon the determination of whether the rule or prohibition sought to be established has a *meaningful referent*.

In the instant case the District Court correctly determined that there was no such standard or frame of reference.<sup>12</sup> The trial court specifically found that (1) the regulation on its face failed to set an ascertainable standard and (2) there was no uniform standard for use by enforcement officers. (357 F.Supp. at 534, Pet. Appx., p. 65.) Yet the circuit court wholly ignored these findings by the trial judge and reinstated the regulation without giving it any meaningful referent.

In order to so hold, the circuit court had to ignore (1) prior rulings of this Court, cited above, which compel the conclusion that the regulation as reinstated is void for vagueness, (2) a clear opportunity to construe the regulation in question in the manner (a) authorized by the National Bureau of Standards, (b) adopted by USDA and EPA, (c) in fact utilized by

<sup>12</sup>In so holding the court mistakenly rejected the analysis presented, *supra*, at pp. 13-14 by amici. Had it accepted this construction there would be the requisite meaningful referent.

virtually all of the States and (3) the published concession by the Food and Drug Administration that its regulation was not sufficiently definite.

Indeed, the Food and Drug Administration (FDA) has itself expressly acknowledged that its reasonable variations regulation is indefinite. Thus, in adopting a set of regulations including the one in question at 32 FR 10729, July 21, 1967, FDA specifically acknowledged its responsibility to promulgate *specific standards* for determining whether any variation is reasonable or unreasonable. To this end the FDA Commissioner stated:

"7. Proposed § 1.8(b)(q) is revised and calls for the net quantity statement to express an accurate statement of the quantity of contents of the package."

Then, after stating the terms of the regulation, the Commissioner continued:

"At a later date the Commissioner will propose an amendment to section 1.8(b)(q) to specify a means whereby industry and State and Federal Government may make a *definitive determination whether any variation is reasonable or unreasonable*." 32 FR at 10730, July 21, 1967. (Emphasis added.)

Thus, while FDA, the agency charged with interpretation of the regulation in issue, has acknowledged that it had not sufficiently defined the enforcement standard, the court below sustains that very regulation.

Thus the court below both ignores a construction of the regulation which would have a meaningful refer-

ent and ignores decisions of this Court which, under the circuit court's interpretation of the questioned regulation, compel the conclusion that the regulation is void for vagueness.

The Ninth Circuit's error in reinstating the questioned regulation justifies review of that decision by this Court.<sup>13</sup>

### 3. THE DECISION BELOW IS CONTRARY TO PRINCIPLES AFFIRMED BY THE SECOND CIRCUIT IN GENERAL MILLS, INC. V. FURNESS

In *General Mills, Inc., et al. v. Furness*, 398 F. Supp. 151 (S.D. N.Y. 1974), *affd.* 508 F.2d 536, the court rejected plaintiffs' contention of preemption of a New York City ordinance regulating the weight

<sup>13</sup>In validating the regulation the court below relied in large part upon this court's decision in *United States v. Shreveport Grain & E. Co.*, 287 U.S. 77 (1932). However, as the District Court points out, 357 F.Supp. at 534, *Shreveport* does not reach the question presented in the instant case: the re-delegation to each USDA compliance officer of deciding whether in "his judgment" a variation (caused by an unknown) is or is not "reasonable."

The court below also relies heavily upon validation by Congressional inaction: "Forty-two years of Congressional silence is strong evidence that Congress has acquiesced in the Secretary's [Agriculture] interpretation of the scope of his powers." (Pet. Appx., p. 26.)

First, the logic of this assertion is questionable—even long-standing acquiescence in unconstitutional activity cannot correct constitutional infirmities.

Second, Congressional inaction may, equally, stand for approval of the States' activity in this field.

Third, the absence of Congressional action on any question is hardly evidence of more than the inherent complexity and slowness of the legislative process. See *National Petroleum Refiners Assn. v. F.T.C.*, (D.C. Cir. 1973), 482 F.2d 672 at 695-97, *cert. denied* 415 U.S. 951 (1973), citing *Power Reactor Development Co. v. Int. Union of Elec. Radio & Machine Wkrs.*, 367 U.S. 396 at 409 (1961) (imputing Congress-

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of prepackaged commodities and in so doing (1) upheld use of Handbook 67 as a means of establishing *prima facie* violations of the New York City net weight ordinance and (2) rejected General Mills' argument that the City's activities in assuring honest weights and measures were preempted by the FPLA.

The opinion of the court below stands in stark contrast to that affirmed by the Second Circuit. The Ninth Circuit rejected use of a lot averaging system, the Second affirmed use of such a system; the court below found that the FPLA preempted State activity, the New York court predicated its opinion upon the recognition that weights and measures enforcement is inherently a matter of local concern; the Ninth Circuit all but eliminated California's power to prescribe permissible variations while the Second affirmed that "a city must be afforded wide discretion in determining what variations from stated weight are reasonable" (398 F.Supp. at 153) even though one consequence might be to require out-of-state packagers to alter their practices to conform to local standards which are applied equally to all.

The conflict in circuits is undeniable. When combined with the devastating impact which the decision below has on California's attempt to assure truth in packaging, upon the police power of the States, and upon the procedures used by virtually every other

sional ratification to a disputed administrative construction of its powers is "shaky business." In the instant case it is an assertion resting upon quicksand). And as the Congress has never had the occasion to review by legislative change the Secretary of Agriculture's enforcement of the Wholesome Meat Act, citation by the court below of *Red Lion Broadcasting Co. v. F.T.C.*, 395 U.S. 367, 381 (1969) and *Flood v. Kuhn*, 407 U.S. 253, 283 (1972) is inapposite.

State in determining weight of prepackaged commodities, amici submit that the conflict in the circuits is serious and requires resolution by this Court.

**4. THE DECISION BELOW WILL HAVE A DECISIVE, ADVERSE IMPACT UPON CONSUMERS AND COMPETITORS AND UPON FEDERAL-STATE RELATIONS**

The present State laws which require a uniform standard of accuracy are important to: (1) *consumers* who must rely on package labels showing net weight or net quantity in comparing values among competing products, (2) *retailers* who not only sell packaged goods in competition with other retailers, but who are also large purchasers of packaged products which they then repackage into smaller products; for example, meat cuts and cheeses, (3) *restaurant operators, schools and other institutions* which buy large quantities of packaged foods, (4) *federal agencies* such as the Department of Defense and the Veterans Administration which buy large quantities of packaged foods, (5) *packagers* of food and other consumer products who are in competition with domestic and foreign packagers, (6) *farmers* who sell to packagers, since shortages in packages can mean less total product purchased, and (7) *manufacturers and servicers of packaging, weighing and measuring equipment* since packagers who are permitted shortages depending upon the type of equipment used are induced to use poor rather than modern, accurate equipment.

The decision below voids State laws designed to (1) enable consumers to rely upon the truth of representations made to them in the marketplace, (2) assure that all competitors must meet the same, beneficial



standards. It substitutes an unenforceable, non-standard which gives guidance to neither field inspector nor packer; substitutes an unnecessary, time consuming package by package inspection system for a practical, statistically valid lot inspection procedure, and forbids an inspector from ordering off sale short weight packages unless he expends his time also ordering off sale over weight packages.

To all the States the consequences of the ruling below are severe. If the ruling below is permitted to stand, there will be no enforceable standard—rather the States will be unable to prevent the sale of food-stuffs which are falsely labeled or adulterated.

The result of the Ninth Circuit's errors is a system conceived in error, designed to assure consumers only that they cannot rely upon the truth of package weight statements and one which frustrates fair enforcement of honest weights and measures laws.

Amici submit that no constitutional principle permits the result reached by the circuit court. As Justice Charles Evans Hughes said in *Savage v. Jones*, 225 U.S. 501, 528 (1911):

“... the Constitution of the United States does not secure to anyone the privilege of defrauding the public.”

Without State laws and State enforcement, there would be no effective weights and measures enforcement in the United States. Federal agencies will not be able to fill the void left by State agencies rendered ineffective by the decision below. First, the decision below precludes use of practical, statistically valid weight testing procedures by both federal and state

governments. Second, Congress has never—from passage of the first Food and Drugs Act of 1906 to the present—provided federal agencies with budgets necessary to employ or train weights and measures personnel. The States have both trained personnel and budgetary resources; and we have more—the inherent power to protect consumers and honest competitors from fraud in the marketplace.

The conflict of the ruling below with the sovereign authority of the States to prevent fraud in the marketplace, with principles of prior decisions of this Court and the certain harm which will follow the Ninth Circuit's decision, justify the granting of certiorari.

### CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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## APPENDIX

The Federal Insecticide, Fungicide, and Rodenticide Act, 61 Stat. 163, as amended by 78 Stat. 190, 193, 7 U.S.C. section 135(a) provides:<sup>1</sup>

It shall be unlawful for any person to distribute, sell, or offer for sale in any Territory or in the District of Columbia, or to ship or deliver for shipment from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, or to receive in any State, Territory, or the District of Columbia from any other State, Territory or the District of Columbia, or foreign country, and having so received, deliver or offer to deliver in the original unbroken package to any other person, any of the following:

. . . .

(2) Any economic poison unless it is in the registrant's or the manufacturer's unbroken immediate container, and there is affixed to such container, and to the outside container or wrapper of the retail package, if there be one through which the required information on the immediate container cannot be clearly read, a label bearing—

(a) the name and address of the manufacturer, registrant, or person for who manufactured;

(b) the name, brand, or trade-mark under which said article is sold; and

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<sup>1</sup>This statute was amended to transfer responsibility for its enforcement to the Administrator, Environmental Protection Agency, by 84 Stat. 2086. No substantive change was made to 7 U.S.C. § 135(a)(2)(c).

(c) *the net weight or measure of the content: Provided, That the Secretary may permit reasonable variations.* (Emphasis added.)

The United States Department of Agriculture issued an interpretation of this statute which has been adopted as a regulation by the Environmental Protection Agency, the agency now charged with its enforcement.

This regulation, 40 C.F.R. §162.104, provides:

*Interpretation with respect to statement of net contents.*

(a) *Requirement of the act.* The act requires that the label of each economic poison bear a statement of the net weight or measure of the contents.

(b) *Terms of weight or measure.* (1) If there are terms of weight or measure in general use for a particular economic poison which will give accurate information to users as to the quantity of content, such terms shall be used on the label.

(d) *Permissible variations.* (1) If the contents are stated as a minimum quantity, the package must contain at least the quantity claimed. No variation below this quantity is permitted and any variation above the contents stated must not be unreasonably large.

(2) The net content is considered to be the average net content unless stated as a minimum quantity. Where average net content is used:

(i) The average content of the packages in any shipment must not fall below the quantity

stated and variation above the quantity stated is permitted only to the extent that it represents deviations unavoidable in good packing practice.

(ii) There must be no unreasonable variation from the average in the content of any package.

(e) *Allowance for loss.* A statement of net content "when packed" does not comply with the requirements of the act. The statement must be such that it will be correct as long as the economic poison is subject to the law. Thus, if a product such as borax may lose weight by drying out when stored in paper bags, it must be packed and labeled in such a way that the statement of net content will be correct when the product is purchased.

## CHECKING PREPACKAGED COMMODITIES

A Manual for Weights and Measures Officials

Malcolm W. Jensen

NATIONAL BUREAU OF STANDARDS  
HANDBOOK 67

U.S. DEPARTMENT OF COMMERCE  
Lewis L. Strauss, Secretary

NATIONAL BUREAU OF STANDARDS  
A. V. Astin, Director

Issued March 20, 1959

[Seal]



## Preface

This publication is the fifth in the series of Handbooks of the National Bureau of Standards designed to present in compact form comprehensive guides for State and local weights and measures officials.

This Handbook presents an operational guide for the control, under law, of prepackaged commodities. It includes information on equipment, techniques, action, reporting, and as an appendix, a comprehensive table that will facilitate the checking of total selling price extensions when these are based on stipulated unit prices.

Authority for such activity on the part of the Bureau is found in basic legislation (64 Stat. 371) wherein the Bureau is authorized to undertake, among others, the following functions: "Cooperation with the States in securing uniformity in weights and measures laws and methods of inspection," and "The compilation and publication of general scientific and technical data resulting from the performance of the functions specified herein or from other sources when such data are of importance to scientific or manufacturing interests or to the general public, and are not available elsewhere \* \* \*."

This Handbook has been published in "pocket" size to further its usefulness to the official and facilitate the adaptation of the price-computation tables to field inspection.

Although the publication has been prepared primarily for use by weights and measures officials of the States, counties, and cities, it is believed that the information presented will be useful to persons employed by commercial and industrial establishments involved in the packing, distributing, and retailing of packaged commodities.

A. V. Astin, *Director.*

## CHECKING PREPACKAGED COMMODITIES

Malcolm W. Jensen

A manual for State and local weights and measures officials, describing a method for controlling various types of prepackaged commodities.

### 1. INTRODUCTION

There is presented here a method of control of prepackaged commodities (commodities put up in packages in advance of being offered for sale) for use by State and local weights and measures officials—a method based on two concepts:

(1) Variations in quantities of packages are not permitted to such extent that the averages of the quantities in the packages comprising a lot, shipment, or delivery is below the quantity stated, and an unreasonable shortage in any individual package is not acceptable, even though overages in other packages in the same lot, shipment, or delivery compensate for such shortages. (This is the basic quantity requirement of the Model Regulation for Prepackaged Commodities adopted by the National Conference on Weights and Measures and of the Federal Food and Drug Administration.)

(2) Perfection in either mechanical devices or human beings has not yet been attained; thus the existence of imperfection *must* be recognized and allowances for such imperfection must be made. These allowances are recognized in the "average" concept.

## 2. GENERAL CONSIDERATIONS

The control of the accuracy of quantity in packages is a specialized, yet extremely vital, phase of weights and measures administration.

Obviously the mere assurance of accurate mechanical equipment is only the foundation of weights and measures control, the culmination of which is the assurance of accurate quantity representations to the consumer through official supervision over the use of the weighing and measuring devices.

Special equipment is required for package-quantity checking, and the personnel assigned to this phase of the weights and measures program must receive special training. Although it is not inappropriate to conduct package-checking procedures in conjunction with and during the store visits made for the primary purpose of scale testing, major efforts in package checking will be most effective if they are separated from other phases of the weights and measures enforcement program. For a sustained program of package checking in a large jurisdiction, it is suggested that the very best results will be obtained if this activity is carried on by trained specialists who concentrate on this type of work.

The inspector assigned principally to mechanical inspections and only as a sideline to package checking will normally execute this phase of his work in the retail stores. Occasionally even he will find it advantageous to check packages at wholesale distributors and even, in special circumstances, at the establishment of the manufacturer or packer. The specialist assigned full time to this work will find that much of his

activity is carried on at the locations of the distributors and the packers in his jurisdiction. He will "run down" reports of package inaccuracies reported by other inspectors and, on his own initiative, spot-check distributors of packaged merchandise.

The primary object of the inspector in this field is to see that quantity is accurately represented to the ultimate purchaser—the consumer; nevertheless, he may be of very real service to the manufacturer, distributor, and retailer if he is able to identify the exact point at which any shortages begin to appear.

Certain packaged products distributed through the normal packer-to-distributor-to-retailer channel are subject to gain or loss of weight through the increase or decrease in moisture content, beginning immediately after the packaging occurs.

The Model Regulation provides that "variations from the stated weight or measure shall be permitted when caused by ordinary and customary exposure \* \* \* to conditions which normally occur in good distribution practice and which unavoidably result in change of weight or measure." The distribution point after which such shrinkage losses are permitted is a statutory or regulatory provision that varies among the States.

It is admitted that such indefinites as "ordinary and customary exposure" and "good distribution practice" are difficult to set forth quantitatively; thus the experience and judgment of the inspector must be relied upon. He will learn to compare various environments and various systems of distribution and storage. As the result of his experience he will be able to develop procedures for conducting a sound investigation



that will result in the building up of a working knowledge as to what is "customary exposure" and what may be considered to be "good distribution practice" with respect to the packages of an individual commodity that may gain or lose weight through gain or loss of moisture.

To be truly adequate, a package-checking program must be extensive with respect to the relative time spent, and diversified with respect to the types of packages checked. General coverage of the packages offered for sale in the jurisdiction is the key to adequacy and appropriateness. A program should not be directed to a single type of package, such as fresh meats in self-service markets, or even to a few types. Packages distributed through interstate commerce, canned peas and bottled vinegar, for example, should receive a proportionate share of attention.

Although a weights and measures administrator will direct concentration on specific items for special surveys or to correct quickly faults that have been discovered, he will plan the general program so as to "sample" all areas of commodities sold in packages.

### **3. CLASSES OF PREPACKAGED COMMODITIES**

There are two distinct classes of prepackaged commodities—"random" packages, representing packages of a single commodity in a variety of random sizes which in most cases are put up in the retail store, and "standard-pack" packages, representing packages of a single commodity put up in selected sizes. Within the standard-pack class there are two categories, those packages sold by weight and those sold by liquid

measure. Although in certain respects the operations in regard to "random" and "standard-pack" packages differ, the equipment used for the checking and the approach to the checking activity are similar in each case.

### **4. EQUIPMENT**

In the belief that the testing equipment used by a weights and measures official should be, insofar as practicable, "standard" equipment designed especially for and restricted to official use and tested regularly and completely controlled by the official, the procedures described here will, for the most part, involve the use of special equal-arm package-reweighing scales and standard test weights. It is recommended that the first such scale required for this work be one of nominal 3-pound (actual, with careful use, 10-pound) capacity, with center tower and side bar. The tower should show zero in the center and 1 ounce divided into 1/16 ounce on each side of zero. The side bar also should have zero in the center, with at least 2 ounces divided into 1/8 ounce on each side of zero. The scale should be fitted with locking devices to hold the lever during transit and with a handle for carrying, and should be provided with a protective cover or box.

For the checking of larger packages, such as hams, turkeys, potatoes, apples, and the like, a similar equal-arm scale with capacity of at least 50 pounds is recommended; however, until such a scale is provided, an approved commercial scale in regular use in a market will be satisfactory. Likewise, scales of even larger capacities, platform beam for example, will be used in the checking of 50- and 100-pound bags of



produce, feed, seed, and the like. Whenever commercial scales are used by the inspector, the weighing of the packages should be done by the "substitution" method (see 9.1, Step 1 (b), below)—that is, substituting on the scale standard weights in an amount equal to the declared weight of the package and thus using the scale only as an indicator. The commercially used scale should not be used by the inspector for direct readings of package weights.

Standard weights employed by the official during check-weighing procedures may be the same as or similar to those used in testing scales. Normally a total of 30 pounds, with denominations down to 1/16 ounce in the customary system and 0.001 pound in the decimal system, is adequate for small packages, and one 25-pound and two 50-pound test weights will be sufficient for most all large packages. Volumetric measures, 1/2 pint to 1 gallon (conical with slicker plates) and a 2-ounce cylindrical glass graduate graduated to 1/2 fluid dram, will be used in checking standard-pack packages sold by liquid measure.

## **5. POSITION FOR PACKAGE-CHECKING OPERATION**

After the announcement of his presence, the official should select a suitable position for his package-checking operations. The principal requirement of the site is convenience—both to the inspector and to the store personnel and customers. If one that is in the customer area of the store yet out of the way of normal customer traffic can be found, it will be quite proper to perform the tasks in the view of the public. This tends to inform the casual onlookers as to one important phase

of the weights and measures program. Such activity also will represent good public relations for the store, if the packages being checked are found to be accurately labeled.

## **6. SAMPLE SELECTION**

*(The word "sample" will be used herein to designate the small group of packages, usually 10, selected to represent a lot, shipment, or delivery. In a storage area such as is found on the premises of a manufacturer, packer, distributor, and in some cases a retailer, the total inventory of a single item of merchandise in a single size may be found to contain 2 or more lots, each indentifiable by a lot symbol. In these instances it is advisable to sample one or more of the individual lots and take action on such individual lot, independent of other lots of the same type package.)*

With the location selected, it is advisable to decide, at least tentatively, the lots of prepackaged items that are to be checked (for example, hamburger, chuck roasts, pork chops, calf liver, sliced American cheese, Swiss cheese, cereal, canned beans, salt, and the like) and select the samples from those lots. There are two important considerations in the selection of samples. First, the sample should be of sufficient number to represent properly the lot from which it is taken, yet not so many as to require for a single lot a disproportionate amount of checking time; and second, the samples should be selected from various places in the lot—top, bottom, center, right, left, front, rear—again so that the lot is properly represented. Under normal conditions a sample of 10 will be adequate. A larger sample does not increase the reliability of the sample in an amount proportional to the increase.

(An exception in the nature of a larger sample for very large lots is explained in Step 5 of the Checking Procedure, page 9 [17-18].)

If practicable, all samples should be selected before the weighing of any is begun. This provides for checking the counter "as found," and avoids any possibility of packages being added to or removed from a lot that is to be checked during the time another lot is being checked, and thus disturbing the as-found condition.

## 7. SCALE TEST

Once the samples have been selected, the scale to be used in the checking procedure is made ready. If the packages are of such size that the equal-arm scale is to be used, the scale must be placed on a firm support and should be leveled. The scale, itself, should be tested in the new environment. (A simple test is appropriate, such as a careful observation of zero-load indication, one or two equal loads on each pan, one small load to test the tower indicator and side bar, and a test for sensitiveness.) A test not only will assure the inspector that his device is operating properly; it will also convince any observers as to the care exercised by the weights and measures official in the conduct of his duties.

If the packages are large, the store scale that is to be used in the checking should be selected, both as to its physical condition and as to its convenience from the standpoint of the store personnel, and should be examined as to its appropriateness for the checking procedure. Such a scale obviously should be a "sealed" scale. It should be checked carefully for sensitiveness

and should be used only if it is sufficiently sensitive to indicate clearly weight in the amount that errors are to be defined. Once the scale has been selected, it should not be released to commercial service until the inspector's use of it has been completed.

## 8. CHECKING PROCEDURE

8.1. *Random Packages* (see also Section 9).—The checking procedure is designed to determine whether the average quantity of contents of the packages in a lot is at least equal to the average declared quantity, and also whether there exist any "unreasonably" large errors in the package labeling. This procedure develops such information through the determination of errors in individual packages. The step-by-step procedure for checking random packages follows:

### *Step 1. Checkweighing.—*

(a) *Equal-Arm Scale.* Weigh each package of the sample representing a single lot by placing on one pan of the scale the package and on the other pan the tare, as represented by similar packaging material (essentially uniform packaging materials having been used for similar packages), and standard weights equal to the declared weight. Read the error as shown on the tower indicator, or tower indicator plus side bar graduations, if the error is greater than the tower capacity, to the nearest 1/16 ounce.

(b) *"Substitution" Method.* First "balance in" on the load-receiving element of the scale to be used, standard weights in small denominations sufficient in total weight to equal the largest plus error that might be expected in the packages to be weighed. Determine



carefully the weight of the packaging material, and then place on the load-receiving element of the scale standard weights in an amount equal to the tare weight plus the labeled weight. Note the exact indication of the scale (either automatically indicated or indicated by poise placement—with or without counterpoise weights—as the case may be). Remove these standard weights from the load-receiving element and place thereon a package to be weighed. Restore precisely the previously noted scale indication by adding or removing standard weights. The weights thus added or removed indicate the package error—*short* (minus) if weights are *added*, *over* (plus) if weights are *removed*.

Because some shortages in package weight are caused by the leaking of fluids from the commodity, and because certain packages are sufficiently watertight that they will hold such leaked fluid, it will be advisable to make special observation in certain instances. If a package containing a commodity suspected of leaking is transparent, and if any tray, cup, or other absorbent packaging material apparently has not absorbed any moisture, the package may be turned upside down so that any fluid will run to the transparent top and be easily seen. If fluid is apparent inside the package, or if the packaging material appears to be or to have been wet and soggy, the package should be opened and the net weight determined directly.

*Step 2. Recording* (see also Section 11).—Record the labeled weight and the error in 1/16 ounce for

each small package, or in an appropriate denomination for each large package. The zero errors (recorded as 0) and the plus errors are listed in one column, the minus errors in a second column (See example, Step 5.)

*Step 3. Unreasonable errors.*—Circle errors that are “unreasonably” large, either plus or minus. The decision as to the unreasonableness of an error, though of necessity arbitrary, must be made any may be predicated, to a certain extent, on knowledge. Consideration should be given to (1) the allowable error in the commercial device employed in the packaging process, (2) the possible error in the scale used to check the packages, (3) anticipated reasonable human errors in both operations, and (4) the susceptibility of the packaged commodity to accurate weight control at the time of packaging. The table that follows is suggested for both random and standard-pack packages that contain items of such a nature that they are susceptible of precise weight control. Standard-pack packages of such commodities as apples, potatoes, and the like cannot be controlled as precisely as can packages of commodities such as peas, corn, sugar, salt, and flour; consequently the inspector must exercise greater liberality in the determination of the reasonableness of errors in packages containing large individual elements.

(It will be noted that the suggested plus allowances are twice the suggested minus allowances at each “labeled quantity.” This is an acknowledgment that packers must be allowed to overfill such packages as are susceptible of moisture loss.)



# UNREASONABLE MINUS OR PLUS ERRORS

Labeled quantity	Minus error Greater than	Plus error Greater than
0 to 2 ounces.....	1/8 ounce.....	1/4 ounce.
2+ to 8 ounces.....	3/16 ounce.....	3/8 ounce.
8 ounces+ to 2 pounds.....	1/4 ounce.....	1/2 ounce.
2+ to 4 pounds.....	5/16 ounce.....	5/8 ounce.
4+ to 7 pounds.....	3/8 ounce.....	3/4 ounce.
7+ to 14 pounds.....	1/2 ounce.....	1 ounce.
14+ to 24 pounds.....	3/4 ounce.....	1 1/2 ounces.
24+ to 36 pounds.....	1 ounce.....	2 ounces.
36+ to 51 pounds.....	8 ounces.....	1 pound.
51+ to 101 pounds.....	2 pounds.....	4 pounds.

The figures offered above are suggested for the determination of the "reasonableness" of errors in individual packages; they should not be used as tolerance figures.

**Step 4. Action based on unreasonable errors.**—Action should be taken with respect to the packages with unreasonable errors (either + or —); the following is suggested:

(a) If one package of the sample of 10 packages has an unreasonably large *minus* error, that package may be ordered repacked or relabeled, or may be held to constitute a violation of the statute and taken as evidence, at the discretion of the inspector.

(b) If there are in the sample of 10 packages 2 or more packages with unreasonably large *minus* errors, the *entire lot* should be held in violation, *without further calculation*. Appropriate action with respect to ordering off sale, prosecution, or the like should be taken. (See 10. Official Action.)

(c) If 3 or less of the sample of 10 packages have unreasonably large *plus* errors, these should be called to the attention of the market operator or the person responsible.

(d) If there are in the sample of 10 packages 4 or more packages with unreasonably large *plus* errors, this should be considered to show poor packaging practice, without further calculation. This situation should be called to the attention of the store operator, who should be instructed as to more precise weighing.

**Step 5. Determination of average error.**—Average errors should be determined for those lots on which conclusions have not been reached under (b) and (d) in Step 4 above. The average error is determined as follows:

(a) As in the example below, add the plus (+) errors, on the one hand, and the minus (—) errors, on the other hand—excluding from the sums the circled figures which represent unreasonably large errors. (The unreasonably large errors, both plus and minus, are excluded from the average, because they are acted upon individually and because their inclusion could destroy or alter the packaging "pattern." For example, a sample could show 9 packages each with a minus error of 1/16 ounce and one package with a plus error of 9/16 ounce. If the large plus error is included, the average error is zero. Actually the "pattern" is minus 1/16 ounce per package, and this is evident when the "unreasonably" large plus error is excluded from the average.)

EXAMPLE

Error in $\frac{1}{16}$ oz	
—	0, +
3	0
1	2
⑥	0
—	2
4	1
	0
	1
	6

(b) Calculate the average error by (1) subtracting the smaller sum (plus errors or minus errors) from the larger sum, (2) giving the result the sign (+ or —) of the larger sum (in the example above:  $+6 - 4 = +2$ ), and (3) dividing the result by the number of items not circled (or the total number of items, including the zeros, included in the sums). Thus, in the example, *average error* =  $+2/9$ .

This figure is the number of 16ths ounce that the “average” package of the sample (representing the lot being checked) deviates from zero error, and the sign indicates whether this average error is plus (overweight) or minus (short weight). This “average” is, of course, exclusive of those packages having unreasonably large errors.

Under many circumstances the inspector will be in a position at this point to declare whether or not the lot under examination conforms to the requirements of the law. In certain instances when a very large lot—say 200 packages or more—is being checked, a further step is advisable. If the average error found in the sample of 10 representing the very large lot

is plus, zero, or significantly minus, a decision on the lot is quite proper. If, however, the average error in the sample of 10 representing a very large lot is just barely minus, the inspector will want to convince himself that his small sample is truly representative. In this case 40 more packages should be selected *at random* from the *same* lot. These 40 packages should be weighed individually, the “unreasonably” large errors, plus and minus, circled and eliminated, and an average error calculated for the sample of 50 (the original 10 and the additional 40). Action should be taken on the lot according to the average error on the sample of 50, regardless of the magnitude of such average error.

Although the calculation designated (b) above is not necessary to establish the primary fact that the average net quantity of contents is or is not below the label quantity, this having been established at the conclusion of the computation designated (a), it is well for the inspector to complete the calculation of the average error in order that his report to his superior may be complete, in order that he may properly inform the packer as to the reason for any official action, and so that any record taken to court may be almost self-explanatory. (For action, if average quantity of contents is less than the declared quantity, see 10. Official Action.)

(It is advisable that all calculations made by the inspector be made on the official report form in order that these may be checked for accuracy later in the office.)

8.2. *Standard-Pack Packages—Contents Sold by Weight.*—The principal difference between the random and standard-pack packages from the standpoint of the checkweighing procedure is in the tare-weight deter-



mination. In random packages the tare material normally is readily available to the inspector, and for any random package being checked a duplicate of the packing material can be used on the checking scale to balance out the tare of the package. Obviously such is not the case in standard-pack packages. A procedure for checking standard-pack packages is given below:

*Step 1.* Weigh *gross* each of the 10 or more packages representing a sample of the same commodity and same type package to identify the *heaviest* and the *lightest* packages, gross weight, and record the gross weight of each.

*Step 2.* Open the lightest package, exercising care that none of the contents is spilled or lost, and determine the *net* weight of the contents. This can be done either by determining carefully the gross and tare weights and then subtracting the tare from the gross, or by weighing equally carefully the net contents. If the package being weighed is a "wet" commodity and if the label does not indicate the net weight is a "net drained weight," the fluid is part of the net weight and must be considered accordingly.

*Step 3.* If the net weight of the lightest package *at least equals* the declared net weight, it may be reasonable to assume that the lot is satisfactory.

*Step 4.* If the net weight of the lightest package *is less than* the declared weight, it will be necessary to treat the 10 packages as a sample of the lot and proceed to weigh them individually to determine individual errors. For this procedure it will be essential to arrive at an average tare weight to be used with the labeled net weight of the contents as the "standard" gross weight with which the package or packages are

compared. In order to arrive at a representative average tare weight for the sample, the *heaviest* package must be opened, and the tare weight of this package and of the previously opened lightest package be determined to the nearest 1/16 ounce. The average of these two tare weights may then be accepted as the tare weight for the weighing of the individual packages. (The inspector is cautioned that the tare of a single package is not considered acceptable as an average tare, and also that no "permanent" or "reference" record of tares is acceptably reliable. The same size can, bottle, or other container may vary significantly in weight over even a reasonably short factory run.)

*Step 5.* With standard weights in an amount equal to the average tare weight arrived at in Step 4 plus the labeled net weight on one side of the scale (or as the standard weight in the "substitution" procedure if an equal-arm scale is not used), weigh each package of the sample representing the lot and record the errors individually. Exclude, by circling, any errors (+ or —) that are unreasonably large, and determine an average error for the sample (see Steps 1, 2, 3, 4, and 5 of 8.1).

**8.3 Standard-Pack Packages—Contents Sold by Liquid Measure.**—The most convenient method of determining the accuracy of net-content labeling of packages containing liquids or semisolids and labeled by liquid measure is by weighing the packages. This method offers a rapid control procedure and should prove satisfactory for enforcement purposes, until the need for court action is indicated. *Any court action must be based on shortages of liquid quantity as determined by standard liquid measure (see Step 7 below).*



The control-by-weight method closely parallels the procedure described in 8.2. for standard-pack packages with contents sold by weight. For simplicity of presentation, a single commodity—fluid milk in 1-quart paper cartons—will be used as the example in the method description that follows:

*Step 1.* Open 2 cartons of milk and determine precisely (to the nearest  $1/32$  ounce) the weight of one *measured* quart of the milk that is contained in the cartons under test, by first weighing an empty 1-quart standard measure and then weighing the measure filled with milk. The difference in the two weights will be the weight of one quart of the milk. This will serve as the *net* weight for the checkweighing procedure. If the first carton that is opened contains insufficient milk to fill the standard measure, use milk from the other carton for this purpose. (The correct net weight for the measured volume of milk must be determined for each dairy and for each type of fluid dairy product from a single dairy.)

*Step 2.* Weigh carefully (to the nearest  $1/32$  ounce) the empty and dried cartons, from which the milk has been removed, to determine the *average* weight of the empty cartons. This average will serve as the *tare* for the checkweighing procedure. (It may be more convenient to go to each dairy plant that is distributing milk in paper cartons in the jurisdiction and weigh at least 10 cartons of each size and design, selected at random from the available stock. The averages thus obtained can serve as the tares for the checkweighing procedures throughout the jurisdiction. If this system of tare determination is followed, the averages should be checked frequently, because the weights of

empty cartons, even from the same manufacturer, will vary somewhat over a period of time.)

*Step 3.* Select at random a sample of at least 10 cartons of milk of a single grade from a single dairy.

*Step 4.* Place on one pan of the equal-arm scale standard weights in the amount of the average tare plus the correct net weight of the cartons under test, and on the other pan one at a time, the cartons of milk to be checked.

*Step 5.* As in Steps 2, 3, 4, and 5 of 8.1., determine the error in weight, to  $1/16$  ounce, of each carton of milk, list the zero errors and plus errors in one column and the minus errors in another column, exclude by circling any errors that are unreasonably large, and determine the average error for the sample. (The weight differences between the gross weights of the commercially filled cartons and the correct gross weights—the sum of the correct *net* weight of the measured quantity of milk and the average *tare* weight for the particular carton—represent the errors, over or under, in terms of weight.)

*Step 6.* If desired, these errors may be converted to liquid measure by determining mathematically the weight of 1 fluid ounce of milk and dividing the weight difference (error) by that figure. Thus, if 1 quart of a particular milk (32 fluid ounces) weighs 34.4 ounces avoirdupois, one fluid ounce weighs  $34.4 \div 32$ , or 1.08 ounces avoirdupois. Then, if a carton is  $\frac{1}{2}$  (0.5) avoirdupois ounce short, it is  $0.5 \div 1.08$ , or 0.46 fluid ounce short.

*Step 7.* If the checking of standard-pack packages labeled in terms of liquid measure is to result in prosecution, the actual complaint should be based on determinations of the quantity of contents of the packages by standard liquid measure. This is done by pouring the contents of each of the packages serving as the sample of the lot into a standard liquid measure and, using the small graduated glass standard, measuring carefully the liquid volume necessary to fill the standard or the liquid volume remaining in the carton after the standard has been filled. These shortages and overages are the errors that are to be considered in the determination of unreasonably short packages and of the average error.

. . . . .

## **10. OFFICIAL ACTION RESULTING FROM PACKAGE CHECKING**

*10.1 Oral Discussions and Instructions.*—Following the completion of the package-checking operations in a particular business establishment, an oral discussion of the results, between the inspector and the person in charge of the establishment, is recommended. Results of the checking should be explained by the inspector, and the information on the report form described. If the samples checked indicate general compliance with the law and regulations, yet there are found inconsistencies in weighing patterns, precision or accuracy less than the inspector is encountering in similar packages by other packers, or any other practices

that should receive attention, these should be explained in detail. Many times the inspector will find that his experience will make possible helpful suggestions for the store operator regarding ways and means of increasing accuracy of package labeling.

Oral discussion may also take the form of a "warning" that certain relatively serious conditions that have been found must be corrected.

Any recommendations, instructions, or warnings that are issued orally should be shown in abbreviated form on the official report, as, for example, "oral instructions re: large overages on packages," "oral instructions re: unnecessary + and — errors," or "warned re: pricing errors." The inference to be drawn from a warning (as distinguished from a recommendation or instruction) is that a continuation of the condition warned against will bring about punitive action by the official.

*10.2. Legal Action.*—In case the checking procedure discloses (a) one or more packages with unreasonably large minus errors, (b) an average minus error for the entire lot of packages, or (c) significant errors in selling price computations of one or more packages, there will have been demonstrated violation of legal requirements, and the need for punitive action may be indicated.

Legal action may take one or more of several forms, as the law in the particular jurisdiction provides, as per instructions from a superior, and as good judgment dictates: (1) "stop-sale" or "off-sale" orders, which

normally provide that the lot cannot be offered for sale until officially released; (2) "reweighing" or "re-marking" orders, which provide that an entire lot or individual items from a lot cannot be offered for sale until they have been corrected as to content or labeling (obviously applicable only to random packages, since standard-pack packages no longer would be standard-pack if each were to be remarked with a corrected quantity of contents); or (3) prosecution, in which case it is advisable to purchase or confiscate samples as evidence of the violation.

Whenever legal action is decided upon, this should be described in full on the official report form.

. . . .

[Appendix to Handbook 67 containing price computation table is omitted.]



Supreme Court, U. S.

FILED

JUN 23 1976

MICHAEL NODAK, JR., CLERK

APPENDIX.

IN THE  
**Supreme Court of the United States**

October Term, 1975  
No. 75-1053

JOSEPH W. JONES, as Director of the County of  
Riverside, California, Department of Weights and  
Measures,

*Petitioner,*

vs.

THE RATH PACKING COMPANY, *et al.*,

*Respondents.*

On Writ of Certiorari to the United States Court of Appeals  
for the Ninth Circuit.

PETITION FOR CERTIORARI FILED JANUARY 26, 1976.  
CERTIORARI GRANTED APRIL 19, 1976.

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**APPENDIX.**



CIVIL DOCKET  
UNITED STATES DISTRICT COURT

73 715 R

Jury demand date:

U. S. D. Form No. 400 Rev.

TITLE OF CASE	ATTORNEYS
GENERAL MILLS, INC., a corporation; THE PILLSBURY COMPANY, a corporation; SEABOARD ALLIED MILLING CORPORATION, a corporation,	For plaintiff: Gibson, Dunn & Grutcher 620-9300 515 So. Flower St., L.A. Ca 90071
Plaintiffs	
VS	
JOSEPH W. JONES, as Director of the County of Riverside Department of Weights and Measures,	
Defendant and counterclaimant,	
VS.	
GENERAL MILLS, INC., a corporation; THE PILLSBURY COMPANY, a corporation; SEABOARD ALLIED MILLING CORPORATION, a corporation,	For defendant:
counterdefendants,	
COMPLT AGAINST "OFF SALE" ORDERS F.O.R.	

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 5 mailed	Clerk	4/2/73	24116	15	4/2/73
		7/11/73	5-1152	3	7/11/73
J.S. 6 mailed	Marshal	10-23-73	24186	5	10/24/73
Basis of Action:	Docket fee				
	Witness fees				
Action arose at:	Depositions				

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Page 2

DATE	PROCEEDINGS	Date Filed or Judgment No.
4/2/73	Fld Complt against "Off Sale" Orders. Issd sumas, Md JS-5.	
4/18/73	Fld retn of sumas.	rs
4/20/73	Fld deft's ANSWER and counterclaim for inj, by Joseph W. Jones. Fld sd defts note of mtn retablr 5/7/73, 9:30am and mtn for pre-lim inj; and supports resp. Fld sd defts affid of John LaRose. Fld sd defts affid of Sanford Blake Ottermess. Fld sd defts affid of V. Miller. Fld defts affid of Ernest J. Carbon.	kh
5/2/73	Fld Ex Parte Application for Cont of Hrg on Mtn for Prelim Injunction & Ord (R) thereon cont to 5/21/73 at 10am.	an
5/10/73	Fld Plt's & Counterdeft's Reply to Counterclaim.	an
5/13/73	Fld note of P/T conf set for 7/16/73, 10AM.	an
5/16/73	Fld Plt's & Counterdeft's Stmt of reasons & memo of pts & auths in opposition to mtn for preliminary injunction; Fld Plt's & Counterdeft's Affidavit of Henry Sumpter, Jr. in opposition to preliminary injunction; Fld Plt's & Counterdeft's Affidavit of Roger C. Miller in opposition to preliminary injunction; Fld Plt's & Counterdeft's Affidavit of Charles E. Joyce in opposition to preliminary injunction; Fld Plt's & Counterdeft's Affidavit of Donald B. Colpitts in opposition to preliminary injunction.	an
5/18/73	Fld Jones's reply to Plt's Memo.	an
5/22/73	LODGED Plt's & Counterdeft's Ord re: Mtn of deft J.W. Jones for preliminary injunction - denied.	an
5/24/73	Fld Deft Jones's Objection to proposed ord.	an
5/24/73	Ord re: prelim injunction denied. Plt to prep order.	McB
6/29/73	Fld deft & counterclaimant Joseph W. Jones' objections to fdgs of fact & conclusions of law proposed by plts. Fld plts' not of mtn retablr 7/16/73, 10am, & mot for summary judgment. Fld plts' statement of reasons & memo of pts & auths in support of not for summary judgment. LODGED plts' findings of fact & conclus of law. LODGED proposed plts' summary judgment.	cam rjf
7-5-73	Fld findings of fact & conclusions of law (R) Mot for a preliminary injunction denied.	mc
7/10/73	Fld Ord (R) that the mot of deft Joseph W. Jones for prelim inj is Denied.	rjf
7/11/73	Fld stip & Ord (R) confd P/T conf retablr at the time of hrg of plts' not for summary judgment. Fld ex parte applc for contd of hrg on mot for summary judgment & Ord (R) retablr 8/13/73, 10am.	rjf rjf

(SEE PAGE 3)

PAGE 3

DATE	PROCEEDINGS	Date Filed or Judgment No.
7/27/73	Fld plts' not of mtn retablr 8/13/73, 10am, & mot for hrg & determination by a District Court of Three Judges.	rjf
8-7-73	Fld mot for ORDER (R) shortening time to 8-13-73, 10am, for hearing on mot for S/J. Fld deft & counterclaimant Joseph W. Jones not of mot for S/J, retablr 8-13-73. Fld mot for S/J by deft & Counter claimant Joseph W. Jones & supporting memo. Fld deft & counter-claimant Joseph W. Jones affid of John La Rose. Fld deft & counter-claimant Joseph W. Jones affid of Sanford Blake Ottermess. Fld deft & counter-claimant Joseph W. Jones affid of James W. Robey. Fld deft & counter-claimant Joseph W. Jones affid of Joseph W. Jones. LODGED PROPOSED findings of fact & conclus law. LODGED PROPOSED S/J.	mr mr mr mr mr mr mr mr
8/9/73	Fld defts & counterclaimant's "Jones" response memo to mot for S/J & to mot for hrg by a Dist Crt of 3 judges.	
8-10-73	Fld Plt's Affid. of Dean C. Dunlavey in Oppos. to Order Shortening time re Jones' Mot. for S/J.	an
8-10-73	Fld Statmt of genuine issues in Oppos. to Jones' Mot. for S/J.	an
8/13/73	Ord the plts' not for S/J; the deft's not for S/J; amtn not for 3-Judge Crt submitted.	McB
8-7-73	LODGED proposed Findings of fact & conclusions of law. (not used, placed in file unsigned.).	mn
9/12/73	Fld memo opin & ord thereon enjoining deft frm applying the provisions of Calif. Business & Professions Code, etc. to the products of plts., etc. The crt retains jurisd & the mot of deft for summary judgment is deny; the mot for a 3-judge crt is deny. Except as herein expressly provided, the mot for summary judgment of plts is deny. (Ent 9/24/73) JS-6 old cpy & nfd prty	
10/17/73	Fld defts NOTICE OF APPEAL, (w/service thereon) cpy to R, and designation of record on appeal.	kh
10/20/73	Fld plts NOTICE OF APPEAL, (w/service thereon) cpy to (R). Fld plts bond for costs on appeal in the sum of 250.00, Fidelity and Deposit Company of Maryland No. 8731694. Placed in file.	
10/23/73	Fld plts cost bond on appeal in the sum, of 250.00 St. Paul Fire and Marine Insurance Co. Placed in file.	kh

I hereby affirm and certify on 11/12/73  
that the foregoing document is a full, true and correct  
copy of the original on file in my office and in my  
legal custody.

FILED IN THE OFFICE OF THE  
CLERK OF THE DISTRICT COURT  
OF THE DISTRICT OF COLUMBIA  
11/12/73

U.S. District Court  
 Filed in D.C. 4/27/73  
 Notice of Appeal  
 Filed: 10/17/73

## 73- 3583

73- 3583

DATE	APPELLANT'S ACCOUNT	BALANCE	RECEIVED	DISBURSED
DEC 27	Deposit, R. <i>12 J. Sullivan 1430.34</i>			
JAN 28	Treasurer U.S.			
JAN 18	Deposit, R. <i>12 J. Sullivan 1430.34</i>			
JAN 18	Treasurer U.S.			

A TRUE COPY  
 ATTEST APR 27 1975  
 EMIL E. MELFI, JR.  
 Clerk of Court  
 by: *Winifred D. Taylor*  
 Winifred D. Taylor  
 Chief Deputy Clerk

To Repro. *12 J. Sullivan 1430.34* from Repro. *JAN 21 1975*

SAME RECORD FOR 74-1051		FILING PROCEEDINGS		CLERK'S FEES	
DATE		APPELLANT	APPEE		
	Filed on December 12, 1973, Motion and ORDER (C) extending time to transmit the record on appeal to January 15, 1974	\$50.			
Dec 21	DOCKET FEE PAID, DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL -ra-				
Dec 28	FILED CERT TRANS OF RECORD ON APPEAL IN THREE VOLUMES: VOL I & II PLEADINGS, ORIG ONLY; VOL III REPORTER'S TRANSC, ORIG & 1 COPY				
1974					
Jan 14	Appellant's Brief Due February 23, 1974				
	PURSUANT TO RULE 28(c) & (h) F.R.A.P. PLAINTIFF BELOW WILL BE DEEMED THE APPELLANT FOR PURPOSES OF FILING BRIEFS AND WILL FILE THE FIRST BRIEF UNLESS OTHERWISE STIPULATED. -ra- Clerk's				
Jan. 22	FILED TWO ADDITIONAL COPIES OF VOLUME ONE AND TWO. gb Fee	\$15.			
Feb 15	Filed orig & 3 cross-aplts' (General Mills) motion for ext of time to file briefs; to "C" cs				
FEB 23 1974	FILED ORDER (C) EXTENDING TIME TO FILE cross applts' (GENERAL MILLS) Brief to MARCH 25, 1974. (rg)				
MAR 4	RECEIVED 25 AMICUS BRIEFS (U.S.A.) cr				
MAR 4 1974	Filed in 74-1051 (USA) as amicus curiae motion for leave to file late brief, with copy of Brief attached to C. (rg)				
MAR 7 1974	FILED ORDER (M) in 74-1051 granting (USA) leave to file amicus curiae brief out of time. (rg)				
MAR 7 1974	FILED (25) BRIEF OF AMICUS (FILED IN 74-1051, for USA) gb				
MAR 12 1974	Filed orig. & 3 appellee's/cross applt's (GENERAL MILLS) motion for further ext of time to file brief to C. (rg)				
Mar 18	Filed Order (M) granting aples/cross-aplts (General Mills) an ext of time to April 24, 1974 for filing briefs. cs				
Apr 15	Filed motion for ext of time to file cross aplt's brief (C) (General Mills) cl				
Apr 18	Filed Order (C) granting cross-aplts (General Mills) an ext of time to May 1, 1974 for filing brief. cs				
MAY 1 1974	FILED 25 APPELLANTS BRIEFS 5/1/74 (for General Mills)				
May 10	Filed aplt's motion for ext of time to file brief (C) cl				



73-3583  
SECOND SHEET

DATE		FILINGS PROCEEDINGS		CLERK'S FEES	
1974.				APPELLANT	APPEE
May 20	Filed order (M) extending time to & including June 24, 1974 to file applt's brief.	ty			
June 14	Filed aplt's (Joseph W. Jones) motion for an ext of time to file brief to (C).	jr			
June 18	Filed order (C) granting aplt an ext of time to July 24, 1974 to file brief. Subject to reconsideration if any objections filed within 7 days.	jr			
JUL 22 1974	FILED 25 APPELLANTS BRIEFS (Joseph W. Jones) (JUL 19 1974) T.J.				
July 22	Filed, as of July 19, 25 briefs of amicus (State of Hawaii) (July 17, 1974).	tj			
July 23	Filed 25 briefs of amicus (State of Calif.) (July 19, 1974)	tj			
August 5	Filed aplt/cross aple (General Mills, etc) motion for an ext of time to file brief to (C).	jr			
August 12	Filed order (C) granting aplt/cross aple (General Mills, etc) an ext of time to September 18, 1974 to file brief. Subject to reconsideration if any objection filed within 7 days.	jr			
August 12	Rec'd amicus curiae counsel's letter requesting that motion for consolidation be granted. (C) jr				
Sept 11	Filed aplt/cross aple (General Mills, etc) motion for an ext of time to file brief to (C).	jr			
Sept 13	Filed order (C) granting aplt/cross aples an ext of time to October 18, 1974 to file reply brief. Subject to reconsideration if any objection filed within 7 days.	jr			
Oct 15	Filed 25 briefs of Aplt/cross Aple (General Mills) (Oct 14, 1974)	tj			
Nov 12	REC'D ORIG. + 24 REPLY BRIEF OF APLT JONES-LATE (11/11/74) fm				
DEC 3 1974	Cause argued & submitted to Br. T. CJJ, Rich.				
1975					
March 12	Rec'd Appellant/Cross-Appellee (County Counsel) add't. citations. (to pane				
Mar 19	-acb- Received Defendant's County Counsel letter of March 17, 1975 supported with USDC of So. Dist of NY opinion dated Feb 25, 1974. (passed to panel)	sj			

73-3583

DATE	FILINGS-PROCEEDINGS	CLERK'S FEES	
		APPELLANT	APPELLEE
1975			
Mar 20	Rec'd aple counsel's letter of additional citations to (panel).	jr	
ct. 29	ORDERED OPINION (RICH) FILED & JUDG TO BE FILED & ENTD		
ct. 29	Filed opinion - Affirmed in part, reversed in part & remanded		
ct. 29	Filed & Entered Judgment. jr 65-34		
ov 7	Filed in 74-1051, Costs Bill (Gen. Mills, Pillsbury & Seaboard)	ec	
JAN 14 1976	ISSUED JUDGMENT [REDACTED]		
ar 2	Filed emergency motion (Jones) for recall of mandate and issuance		
	of stay of mandate pending action by the U.S. Supreme Ct. upon		
	petition for writ of cert. (panel) ec		
ar.12	Filed, in 74-1051, order (Br, T & Rich) the motion to recall		
	the mandate is denied. jr		
eb. 9	Received notice from Supreme Court that petition for certiorari		
	has been filed. Assigned No. 75-1052. wdt		
pr. 26	Filed certified copy of Supreme Court order granting certiorari		
	on April 19, 1976. To panel. wdt		

74-1051

CPA LC 9.73.2900.4

CROSS APPEAL TO: 73-3583

*For Appellant:*  
Dean C. Dunlavey, Esq.  
Gibson, Dunn & Crutcher

Plaintiffs - Appellants

vs.

JOSEPH W. JONES, as Director of the  
County of Riverside Department of  
Weights and Measures,

*For Appellee:*  
Ray T. Sullivan, Jr., County  
Counsel  
Loyal E. Keir, Deputy County  
Counsel

Defendant - Appellee

[illegible]

74-1051

SAME RECORD FOR 73-3583		CLERK'S FEES	
DATE	FILINGS PROCEEDINGS	APPELLANT	APPEE
Dec 28	Filed on December 12, 1973 In 73-3583, Motion and Order (C) extending time to transmit the record on appeal to Jan 15, 1974 FILED CERT TRANSC OF RECORD ON APPEAL (Filed In 73-3583) IN THREE VOLUMES: VOL I & II, PLEADINGS, ORIG ONLY; VOL III REPORTER'S TRANSC, ORIG & 1 COPY		
Jan 11	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL		
Jan 14	Appellant's Brief Due February 23, 1974  PURSUANT TO RULE 28(c) & (h) F.R.A.P. PLAINTIFF BELOW WILL BE DEEMED THE APPELLANT FOR PURPOSES OF FILING BRIEFS AND WILL FILE THE FIRST BRIEF UNLESS OTHERWISE STIPULATED		
Jan 22	FILED IN 73-3583 TWO ADDITIONAL COPIES OF VOLUME I & II. Clerk's Fee \$15.00		
Feb 15	Filed, in 73-3583, orig & 3 cross-appls' (General Mills) motion for ext of time to file briefs; to "C" cs		
FEB 24 1974	FILED ORDER (C) in 73-3583 extending time to file cross appls' (GENERAL MILLS) brief to MARCH 25, 1974. (rg)		
MAR 4	REC'D IN 73-3583, 25 AMICUS BRIEFS (U.S.A.) cr		
MAR 4 1974	Filed orig. & 3 (USA) as amicus curiae motion for leave to file late brief with copy of brief attached to C. (rg)		
MAR 7 1974	FILED ORDER (M) GRANTING (USA) leave to file amicus curiae brief out of time. (rg)		
MAR 7 1974	FILED (25) BRIEF OF AMICUS (FOR USA) ab		
MAR 12 1974	Filed in 73-3583 appellee's/cross applt's (GENERAL MILLS) motion for further ext of time to file brief to C. (rg)		
Mar 18	Filed, in 73-3583, Order (M) granting aples/cross-appls (General Mills) an ext of time to April 24, 1974 for filing briefs. cs		
Apr 15	Filed in 73-3583 motion for extension of time to file cross aplt's brief (General Mills) (C) cl		
Apr 18	Filed, in 73-3583, Order (C) granting cross-appls (General Mills) an ext of time to May 1, 1974 for filing brief. cs		
May 1	Filed, in 73-3583, 25 appellants briefs (for General Mills) gb		
May 10	Filed in 73-3583 aplt's motion for ext of time to file brief (C) cl		
May 20	Filed order in 73-3583 (M) extending time to June 24 to file applt's brief. ty		

SEE SECOND SHEET

## SECOND SHEET - #74-1051

DATE	FILINGS PROCEEDINGS	CLERK
1974		APPELLANT
June 14	Filed, in 73-3583, aplt's (Joseph W. Jones) motion for an ext of time to file brief to (C). jr	
June 18	Filed order (C), in 73-3583, granting aplt an ext of time to July 24, 1974 to file brief. Subject to reconsideration if any objection filed within 7 days. jr	
July 22	Filed 25 Aples briefs (Jones), cross Apls brief in 73-3583. (July 19, 1974) tj	
July 22	Filed, in 73-3583, as of July 19, 25 briefs of amicus, (State of Hawaii) (July 17, 1974). tj	
July 23	Filed, in 73-3583, 25 briefs of amicus, (State of Calif). (July 19, 1974)	
July 26	Filed, in 73-2481, aple/cross aplt's (Rath) motion for priority in hearing date re oral argument to (C). jr	
July 29	Filed, in 73-2496, aplt's (J. Jones) motion for consolidation of #73-3583 & #73-1051 for oral argument on appeal and to expedite oral argument to (C). jr	
July 31	Filed, in 73-2481, order (C) granting aplt (J. Jones) priority in hearing date re oral argument. Subject to reconsideration if any objection filed within 7 days. Clerk will try for an October, 1974 date. jr	
August 2	Rec'd, in 73-2481, Atty General's letter joining in motion for priority hearing. cs	
Aug 5	Filed, in 73-2481, aple & aplt's (Rath) opposition to motion to consolidate for argument, etc. to (C). jr	
Aug 13	Filed, in 73-2481, aplt's (Jones) response to Rath's opposition to motion for consolidate appeals. cs	
Aug 13	in 73-3583 Rec'd, as of August 12, 1974, amicus curiae counsel's letter requesting that motion for consolidation be granted. (C) jr	
Sept 11	Filed, in 73-3583, aplt/cross aple (General Mills, etc) motion for an ext of time to file brief to (C). jr	
Sept 13	Filed, in 73-3583, order (C) granting aplt/cross aple an ext of time to October 18, 1974 to file reply brief. Subject to reconsideration if any objection filed within 7 days. jr	

74-1051

DATE	FILINGS PROCEEDINGS	CLERK'S FEES
		APPELLANT APPELL
Oct 15	Filed, in 73-3583, 25 briefs of Aplt/cross Aple (General Mills) (Oct 14, 1974) tj	CALENDARED 12/1/74
Nov 12	REC'D ORIG. + 24 REPLY BRIEF OF APLT JONES - LATE (11/11/74) fm	
DEC 5 1974	Cause argued & submitted to Br. T, CJJ, Rich.	
1975	(Deputy County Counsel)	
March 12	Rec'd Aplt/Cross-Aple/letter re: Additional citations. (to panel)	
Mar 19	Rec'd Defendant's County Counsel letter March 17, 1975 supported with USDC of So. Dist of NY opinion dated Feb 25, 1974. (passed to panel) sj	
Mar 20	Rec'd, in 73-3583, aple counsel's letter of add'l citations to (panel). jr	
Oct. 29	ORDERED OPINION (RICH) FILED & JUDG TO BE FILED & ENTD	
Oct. 29	Filed opinion - Affirmed in part, reversed in part & remanded	
Oct. 29	Filed & Entered Judgment. t 15-34	
Nov 7	Filed Bill of Costs (Gen. Mills, Pillsbury & Seaboard). ec	
JAN 14 1976	ISSUED JUDGMENT	
Mar 2	Filed in 73-3583, emergency motion (Jones) for recall of mandate, etc. (pa)	
Mar 12	Filed order (Br. T & Rich) the motion to recall of mandate is denied. jr	
Feb. 9	Received notice from Supreme Court that petition for certiorari has been filed. Assigned No. 75-1052. wdt	
Apr. 26	Filed certified copy of Supreme Court order granting certiorari on April 19, 1976. To panel. wdt	



The Opinion of the United States Court of Appeals for the Ninth Circuit in the Case of *The Rath Packing Company v. M. H. Becker, et al.*, docket numbers 73-2481, 73-2482, 73-3092, 73-2496 and 73-3180, is in the Appendix to the Petition, pages 1-34.

The Opinion of the United States Court of Appeals for the Ninth Circuit in the case of *General Mills, Inc., et al. v. Joseph W. Jones*, docket numbers 74-1051 and 73-3583, is in the Appendix to the Petition, pages 35-52.

**Complaint for Declaratory Relief and Injunction Against  
"Off Sale" Orders.**

United States District Court, Central District of California.

General Mills, Inc., a corporation; The Pillsbury Company, a corporation; Seaboard Allied Milling Corporation, a corporation, Plaintiffs, vs. Joseph W. Jones as Director of the County of Riverside Department of Weights and Measures, Defendant. Civil Action No. 73-715-R.

As and for their complaint herein, plaintiffs allege as follows:

1. Plaintiff General Mills, Inc. is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business in the State of Minnesota. Plaintiff The Pillsbury Company is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business in the State of Minnesota. Plaintiff Seaboard Allied Milling Corporation is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business in the State of Massachusetts.

2. Defendant Joseph W. Jones ("Jones") is Director of the County of Riverside Department of Weights and Measures and is a California citizen.

3. This action is instituted and arises under the Constitution of the United States, under 15 U.S.C. §§ 1451-1461 (the Fair Packaging and Labeling Act), and under 21 U.S.C. §§ 301-392 (the Federal Food, Drug, and Cosmetic Act). Furthermore, this action is between citizens of different states. The matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs. Jurisdiction of this Court is based on 28 U.S.C. §§ 1331(a) and 1332(a); venue is based on 28 U.S.C. § 1391. This also is a civil action for a judgment declaring the rights and other legal relations of the parties hereto, pursuant to 28 U.S.C. §§ 2201 and 2202, in respect to an actual controversy between them which is within the jurisdiction of this Court.

4. Each plaintiff joins in this one action in that each plaintiff asserts a right to relief in respect of and arising out of the same series of transactions and occurrences, and questions of law and fact common to all of them will arise in the action.

5. Each plaintiff manufactures, packages and sells wheat flours conforming to definitions and standards of identity set forth in 21 C.F.R. Part 15, Subpart A promulgated by the Secretary of Health, Education and Welfare pursuant to 21 U.S.C. §§ 341, 371; each plaintiff is engaged in interstate commerce in so doing. Wheat flours are "foods" under the Federal Food, Drug, and Cosmetic Act and those sold through retail stores are "consumer commodities" under the Fair Packaging and Labeling Act.

6. The labeling of all wheat flours manufactured, packaged and sold by each plaintiff is performed in

accordance with the applicable requirements of the Federal Food, Drug, and Cosmetic Act and of the Fair Packaging and Labeling Act and of regulations promulgated thereunder by the Secretary of Health, Education and Welfare. Said statutes require on the label of each wheat flour package an accurate statement of the quantity of contents of such package in terms of weight, exclusive of wrappers and other material packed therewith, at the time such wheat flour package is introduced or delivered for introduction by each plaintiff into interstate commerce or distributed or caused to be distributed by plaintiff in interstate commerce (15 U.S.C. §§ 1452-1453; 21 U.S.C. §§ 331(a), 343(e)). Said regulations provide, pursuant to 15 U.S.C. § 1454(b) and 21 U.S.C. § 343(e), that reasonable variations from the stated quantity of contents caused by loss or gain of moisture during the course of good distribution practice or by unavoidable deviations in good manufacturing practice will be recognized (Title 21, Code of Federal Regulations § 1.8b(q)).

7. Because of the nature of wheat flours and their manufacture, reasonable variations from the stated quantity of contents are caused by unavoidable deviations in good manufacturing practice and by loss or gain of moisture during the course of good distribution practice.

8. Defendant Jones now contends to have the right to impose, and has imposed and is imposing, on said wheat flour packages requirements as to labeling of the net quantity of contents which are in addition to and different from, and which conflict with, the requirements of said federal statutes and regulations and which are less stringent than and/or require information different from the requirements of said federal statutes and regulations. In particular, defendant Jones

now contends to have the right to impose, and has imposed and is imposing, a labeling requirement that the statement on each such package of wheat flour of the quantity of contents of such package in terms of weight be accurate at a time after such package is introduced or delivered for introduction by each plaintiff into interstate commerce, or after such package is distributed or caused to be distributed by each plaintiff in interstate commerce; namely, at the time of sale or offer for sale at the retail or consumer level.

9. Defendant Jones contends that said labeling requirement is imposed by him lawfully pursuant to the authority of California Business and Professions Code §§ 12211 and 12607 and Title 4, California Administrative Code, Chapter 8, sub-chapter 2 (said statutes and regulations sometimes referred to hereinafter collectively as the "state weight law").

10. Pursuant to defendant Jones' aforesaid contentions and requirements, and by acting through his deputies and inspectors, defendant Jones has ordered and is ordering "off sale" packages of wheat flour manufactured, packaged, labeled, and sold by each plaintiff in full compliance with the applicable requirements of the aforesaid federal statutes and regulations, and otherwise has prevented and is preventing the sale by each plaintiff and by retailers of such packages of wheat flour.

11. In doing the foregoing, each plaintiff contends that defendant Jones is acting unlawfully and beyond the scope of his authority, in that:

(a) said state weight law as applied by defendant Jones to plaintiffs' wheat flours constitutes a deprivation of property without due process of law and is violative of the 14th Amendment to the Constitution of the United States;

(b) said state weight law as applied by defendant Jones to plaintiffs' wheat flours is an unlawful and unreasonable burden on interstate commerce;

(c) said state weight law as applied to plaintiffs' wheat flours is necessarily and expressly preempted by, and is in addition to and different from and in conflict with, laws of the United States which are the supreme law of the land;

(d) plaintiffs' wheat flours are exempted by California law from said state weight law;

(e) defendant Jones is not applying the state weight law to plaintiffs' wheat flours in accordance with California law;

(f) Title 4, California Administrative Code, Chapter 8, sub-chapter 2 is invalid for failure to comply with California Business and Professions Code § 12211 and/or § 12607.

12. By his said unlawful acts, defendant Jones has caused each plaintiff monetary damages in excess of \$10,000, as well as irreparable injury to its reputation among dealers and the consuming public. Defendant Jones is continuing and threatening to continue his said acts, and will cause each plaintiff further monetary damages and further immediate and irreparable injury, unless and until restrained by this Court. Pecuniary compensation to any plaintiff will not afford adequate relief for such acts.

13. An actual controversy now exists between each plaintiff and defendant Jones with respect to the legal relations of the parties and the rights of each plaintiff under the Constitution of the United States, under the aforesaid federal statutes and regulations, and under California law. The value to each plaintiff of its right to be free of the aforesaid requirements imposed by



defendant Jones exceeds the sum of \$10,000, exclusive of interest and costs.

WHEREFORE, each plaintiff prays judgment as hereinafter set forth:

1. Declaring that the imposition of the state weight law (sections 12211 and 12607 of the Business and Professions Code and Title 4, California Administrative Code, Chapter 8, sub-chapter 2, individually and collectively) on each plaintiff's wheat flours is unlawful and beyond Jones' authority for each and every ground alleged in paragraph 11 of this Complaint; and

2. Permanently restraining and enjoining defendant Jones, and his deputies, inspectors, officers, agents, servants, employees, attorneys and other persons in active concert or participation with him:

(a) from imposing the said state weight law (sections 12211 and 12607 and sub-chapter 2, individually and collectively) on each plaintiff's wheat flours; and

(b) from imposing on each plaintiff's wheat flours any labeling requirement which is unconstitutional, or which is in addition to or different than or in conflict with requirements made under the Federal Food, Drug, and Cosmetic Act and/or under the Fair Packaging and Labeling Act, and/or which is not in accordance with California law; and

3. For costs of suit incurred by each plaintiff; and

4. For such other and further relief which the Court may deem just and proper.

GIBSON, DUNN & CRUTCHER

/s/ By Dean C. Dunlavey

Dean C. Dunlavey

Attorneys for Plaintiffs

**Answer and Counterclaim for Injunction.**

United States District Court, Central District of California.

General Mills, Inc., a corporation; The Pillsbury Company, a corporation; Seaboard Allied Milling Corporation, a corporation, Plaintiffs, vs. Joseph W. Jones, as Director of the County of Riverside Department of Weights and Measures, Defendant.

Joseph W. Jones, as Director of the County of Riverside Department of Weights and Measures, Counterclaimant, vs. General Mills, Inc., a corporation; The Pillsbury Company, a corporation; Seaboard Allied Milling Corporation, a corporation, Counter-defendants. Civil Action No. 73-715-R.

Defendant, JOSEPH W. JONES, hereinafter Jones, for his answer and counterclaim herein, alleges as follows:

1. Admits the allegations of Paragraph 1.
2. Admits the allegations of Paragraph 2.
3. Denies that this action arises under the Constitution of the United States or under the Federal Fair Packaging and Labeling Act, 15 U.S.C. Sections 1451-1461, but otherwise admits the allegations of Paragraph 3.
4. Denies upon information and belief the allegations set forth in Paragraph 4.
5. Admits that each Plaintiff manufactures, packages, and sells wheat flours, that each Plaintiff is engaged in interstate commerce, that wheat flours are "foods" and that foods sold through retail stores are "consumer commodities", but otherwise denies the allegations in Paragraph 5.
6. Admits that the Federal Food, Drug and Cosmetics Act, i.e. 21 U.S.C. Section 343(a) and (e),

requires an accurate statement of the quantity of the contents on each package of food products in terms of weight, measure, and numerical count, and further admits that certain regulations promulgated by the Secretary of the Department of Health, Education and Welfare provide that reasonable variations from the stated quantity of contents caused by loss or gain of moisture during the course of good distribution practice or by unavoidable deviation in good manufacturing practice will be recognized, but otherwise denies the allegations of Paragraph 6.

7. Denies upon information and belief the allegations of Paragraph 7.

8. Admits that defendant has imposed requirements that the packaged food products manufactured or prepared by plaintiffs should conform accurately to the label weight of the packages at retail, but otherwise denies the allegations of Paragraph 8.

9. Admits that defendant ordered off-sale packages of food products manufactured or prepared by plaintiffs, pursuant to the authorization of California Business and Professions Code, Section 12211 and 4 California Administrative Code, Chapter 8, Subchapter 2, but denies that he imposed any labeling requirements.

10. Admits that Jones has ordered off-sale packages of wheat flour manufactured, packaged, labeled and sold by each plaintiff, but denies the remaining allegations in Paragraph 10.

11. Denies the allegations set forth in Paragraphs a through f.

12. Denies the allegations of Paragraph 12.

13. Denies the allegations of Paragraph 13.

*First Affirmative Defense*

14. The complaint fails to state a claim against Jones upon which relief cannot be granted.

*Second Affirmative Defense*

15. In making the off-sale orders described in the complaint Jones acted in accordance with the statutory authority contained in the California Business and Professions Code Section 12211 and the regulatory authority set forth in 21 C.F.R. Section 1.8(b)(q).

*Third Affirmative Defense*

16. Counterdefendants' unclean hands constitute a bar to equitable relief. They have violated not only state, but also *federal*, law. The distribution by them of packages of wheat flour misbranded as to weight is proscribed by the Federal Food, Drug and Cosmetics Act, as amended December 30, 1970, Pub. L. 91-601, Section 7(c), 84 STAT. 1673, 21 U.S.C. Section 343(a) and (e). Such federal law is even more strict than the California law. Under the California law, reasonable plus or minus variations are permitted within a range of tolerances prescribed by the California Administrative Code. However the federal law requires an exact standard of accuracy. Although the regulation promulgated by the Secretary of Health, Education and Welfare, *i.e.*, 21 C.F.R. Section 1.8(b)(q), provides for "reasonable variations", such regulation is vague and indefinite in defining reasonableness, and is therefore void, thereby leaving the federal statute as an exact and precise statute which permits no variations whatever from the weight stated on the package labels.



*Counterclaim*

17. Jones is Director of the Department of Weights and Measures of the County of Riverside and is a citizen of the State of California.

18. Counterdefendant General Mills, Inc. is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business in the State of Minnesota. Counterdefendant The Pillsbury Company is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business in the State of Minnesota. Counterdefendant Seaboard Allied Milling Corporation is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business in the State of Massachusetts.

Each counterdefendant has qualified to do business in the State of California and does business within the County of Riverside, State of California, and elsewhere within the State of California.

19. Each counterdefendant manufactures, packages, and sells wheat flours, and is engaged in interstate commerce. Wheat flours constitute foods under the Federal Food, Drug and Cosmetics Act, and the flours sold through retail stores are consumer commodities.

20. For purposes of this counterclaim Jones relies upon, and accordingly incorporates by reference, the allegations of jurisdiction set forth in Paragraph 3 of the complaint and admitted in Paragraph 3 herein. Although no independent grounds of jurisdiction are required, Jones also relies upon 21 U.S.C. §332, and upon the judicial doctrine of pendent or ancillary jurisdiction, and accordingly alleges that this Court has

pendent or ancillary jurisdiction for purposes of this counterclaim.

21. At all times herein mentioned, counterdefendants, and each of them, were engaged in the business of processing, packaging, selling, distributing and otherwise disposing of packages of wheat flour to the general public and to others for resale to the general public within the County of Riverside, State of California.

22. Beginning at an exact date unknown to counterclaimant, but beginning at least six (6) months prior to the filing of this counterclaim and continuing to the date of this counterclaim, counterdefendants, and each of them, have engaged in and are still engaging in a pattern of conduct constituting actions of unfair competition as made unlawful and prohibited by Civil Code Section 3369, by making the representations as hereinafter set forth, each of which constitutes an unlawful, unfair and fraudulent business practice.

23. The representations referred to in Paragraph 22, *supra*, have been made by counterdefendants and each of them by causing packages of wheat flour, packaged by counterdefendants, and each of them, to be labeled certain net weights, such as, 5 pounds, 10 pounds and 50 pounds, and by distributing the same for sale to various food distributors in Riverside County, California, including, but not limited to, the distributors named herein. The schedule set forth below contains the names of the distributors, the dates of inspection by Jones' inspectors, and the numbers of packages marked off-sale classified according to size of packages.



<u>Dates of Inspection</u>	<u>No. of Pkgs. Marked Off Sale</u>	<u>Miller</u>	<u>Distributor</u>
<b>2 lb. pkgs.</b>			
10-16-72	3,288	Seaboard	Certified Grocers
<b>5 lb. pkgs.</b>			
10-16-72	325	Pillsbury	A. M. Lewis
10-17-72	10,830	Seaboard	Certified Grocers
12-1-72	7,200	Pillsbury	Certified Grocers
10-17-72	800	Pillsbury	A. M. Lewis
11-28-72	800	Pillsbury	A. M. Lewis
<b>10 lb. pkgs.</b>			
10-16-72	2,660	Seaboard	Certified Grocers
10-16-72	35	Pillsbury	A. M. Lewis
10-17-72	2,865	Gen'l Mills	A. M. Lewis
11-28-72	1,100	Gen'l Mills	A. M. Lewis
<b>25 lb. pkgs.</b>			
11-29-72	678	Gen'l Mills	Certified Grocers
<b>50 lb. pkgs.</b>			
11-28-72	37	Gen'l Mills	A. M. Lewis

24. On each date set forth in Paragraph 23, *supra*, an inspector employed by Jones in his capacity of Director of the Department of Weights and Measures of the County of Riverside, inspected sample packages of wheat flour, determined the net weight of the contents of the packages inspected, and found that said packages contained less than the label weight stated on the package.

25. Since the direct and proximate result of the actions of counterdefendants and each of them constitutes unfair competition as hereinabove set forth, consumers have been deceived and thereby injured,

and competitors of counterdefendants have been injured inasmuch as they must either adopt counterdefendants' unlawful practices to successfully compete at the consumer trade level or lose substantial business to counterdefendants.

26. Unless restrained by this Court counterdefendants and each of them will perform the acts referred to, and such acts will result in irreparable injury, loss, and damage to the general public.

27. The issuance of a preliminary injunction herein pending the final hearing and determination by this Court will not create any burden on the counterdefendants that they would not otherwise sustain if they complied with the law.

WHEREFORE, counterclaimant prays for judgment in his favor:

(1) Declaring that the enforcement of the California law and regulations in ordering off-sale packaged wheat flour when such packages are misbranded as to weight at the consumer trade level, (a) is not preempted by federal law, (b) does not constitute a deprivation of property within due process of law and is not violative of the Fourteenth Amendment to the Constitution of the United States and (c) does not constitute a burden on interstate commerce.

(2) Ordering that the complaint against Jones to enjoin him from ordering off-sale packaged wheat flour when such packages are misbranded as to weight at the consumer trade level, be denied.

(3) Dismissing the action on the grounds that (a) there is no genuine issue as to any material fact and that this defendant is entitled to judgment as a matter of law, (b) in making the off-sale orders Jones acted

in accordance with California statutory and regulatory authority, and (c) counterdefendants' unclean hands constitute a bar to equitable relief.

(4) Restraining and enjoining the counterdefendants from engaging in, committing or performing, directly or indirectly, or by any means whatsoever, any of the following acts:

(a) Carrying on any unlawful, unfair or fraudulent business practices in connection with the sale of wheat flour processed, packaged and distributed by the counterdefendants and each of them, and

(b) Distributing, offering for distribution or sale packages of wheat flour to the general public, or to any other person, corporation or other entity, for sale or distribution to the general public, unless the net weight of the contents of the said packages is equal to the net weight marked on the package labels.

(5) Granting such other and further relief which the Court may deem just and proper.

Dated: April 19, 1973.

RAY T. SULLIVAN, JR.,  
County Counsel

LOYAL E. KEIR,  
Deputy County Counsel

/s/ By Loyal E. Keir

Loyal E. Keir, Deputy County Counsel  
Attorneys for Defendant and Counter-  
complainant, Joseph W. Jones

## VERIFICATION

State of California, County of Riverside—ss.

JOSEPH W. JONES, being duly sworn, deposes and states that he resides in the City of Riverside, State of California; that he is the defendant and counterclaimant herein; that he has read the foregoing Answer and Counterclaim and knows the contents thereof, and that the same are true of his own knowledge except as to the matters therein stated to be alleged on information and belief and as to those matters he believes them to be true.

Executed on April 19, 1973 at Riverside, California.

/s/ Joseph W. Jones

JOSEPH W. JONES, Defendant  
and Counterclaimant

Subscribed and Sworn to before me this 19th day of April, 1973.

/s/ Anita L. Fullinwider  
ANITA L. FULLINWIDER  
Notary Public in and for  
Said County and State\*

[Seal]

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\*Affidavit of Service by mail is omitted.

**Reply to Counterclaim.\***

United States District Court, Central District of California.

General Mills, Inc., a corporation; The Pillsbury Company, a corporation; Seaboard Allied Milling Corporation, a corporation, Plaintiffs and Counterdefendants, vs. Joseph W. Jones, as Director of the County of Riverside, Department of Weights and Measures, Defendant and Counterclaimant. Civil Action No. 73-715-R.

Each of General Mills, Inc., The Pillsbury Company and Seaboard Allied Milling Corporation, as and for its reply to the counterclaim herein, admits, denies alleges as follows:

1. Answering Paragraph 19, admits the averments thereof and alleges that flours sold through retail stores are "consumer commodities" under the federal Fair Packaging and Labeling Act.

2. Answering Paragraph 20, admits the averments set forth in Paragraph 3 of the complaint which are admitted in Paragraph 3 of the answer. Except as hereinabove specifically admitted, denies the averments thereof.

3. Answering Paragraph 21, admits that each counterdefendant was and is engaged in the business of processing, packaging, selling and distributing packages of wheat flour intended for ultimate re-sale to the general public within the County of Riverside, State of California. Except as hereinabove specifically admitted, denies the averments thereof.

4. Answering Paragraph 22, denies the averments thereof.

\*Certificate of Service by mail is omitted.

5. Answering Paragraph 23, admits that it has packaged wheat flour, has caused such packages to be accurately labeled as to net weight, and has distributed the same to food distributors in Riverside County, California; admits that some such packages have been ordered off-sale by defendant Jones' inspectors. Except as hereinabove specifically admitted, denies the averments thereof.

6. Answering Paragraph 24, is without knowledge or information sufficient to form a belief as to the truth of the averments thereof.

7. Answering Paragraph 25, denies the averments thereof.

8. Answering Paragraph 26, denies the averments thereof.

9. Answering Paragraph 27, denies the averments thereof.

**FIRST AFFIRMATIVE DEFENSE**

10. The counterclaim fails to state a claim upon which relief can be granted.

WHEREFORE, each counterdefendant prays judgment as hereinafter set forth:

1. As prayed in the complaint; and
2. That counterclaimant take nothing under the counterclaim and that it be dismissed.

**GIBSON, DUNN & CRUTCHER**

/s/ By Dean C. Dunlavy

Dean C. Dunlavy

Attorneys for Plaintiffs and  
Counterdefendants



**Affidavit of Erwin V. Miller.**

United States District Court, Central District of California.

General Mills, Inc., a corporation; The Pillsbury Company, a corporation; Seaboard Allied Milling Corporation, a corporation, Plaintiffs, vs. Joseph W. Jones, as Director of the County of Riverside Department of Weights and Measures, Defendant.

Joseph W. Jones, as Director of the County of Riverside Department of Weights and Measures, Counterclaimant, vs. General Mills, Inc., a corporation; The Pillsbury Company, a corporation; Seaboard Allied Milling Corporation, a corporation, Counterdefendants. Civil Action No. 73-715-R.

State of California, County of Riverside—ss:

Erwin V. Miller, being first duly sworn, states as follows:

1. He is now and at all times herein mentioned was a duly appointed, qualified and acting Inspector for the Department of Weights and Measures for the County of Riverside, State of California.

2. He has been employed as an Inspector for the said Department of Weights and Measures since February, 1969 and among his duties are the following:

(a) Periodic inspections of wholesale warehouses to determine whether or not there is compliance with state laws and regulations with respect to quantities of products delivered to the general public.

(b) Detecting violations of the California Administrative Code and, in particular, Title 4, Chapter 8, Sub Chapter 2, Article 5 thereof pertaining to Weights and Measures.

3. In connection with his inspections and determination of fair and accurate weights and measures he uses the criteria set forth in Title 4, Chapter 8, Sub Chapter 2, Article 5 of the California Administrative Code, and in particular utilizes the procedure set forth therein at Section 2933.3, and sub-sections thereof, records the data taken as a result of the tests specified therein and takes appropriate action as set forth therein.

4. On October 16, 1972, in the ordinary course of his business, he went to the A. M. Lewis Company warehouse, 2727 Kansas Street, Riverside, California, and with the assistance of Weights and Measures' Inspector S. B. Otterness, also of the Riverside County Department of Weights and Measures, inspected the following items for correct and accurate quantity.

(a) Flour, All Purpose Gold Medal, General Mills 10 pound bags, Code #C207A1, A212A1.

Bag No. 1 minus 2¼ ounces	Bag No. 21 minus 1½ ounces
Bag No. 2 minus 1½ ounces	Bag No. 22 minus 1¼ ounces
Bag No. 3 minus 1¾ ounces	Bag No. 23 minus 1¾ ounces
Bag No. 4 minus 1¾ ounces	Bag No. 24 minus 2 ounces
Bag No. 5 minus 1½ ounces	Bag No. 25 minus 1½ ounces
Bag No. 6 minus 2 ounces	Bag No. 26 minus 1½ ounces
Bag No. 7 minus 2 ounces	Bag No. 27 minus 1¾ ounces
Bag No. 8 minus 1¼ ounces	Bag No. 28 minus 2 ounces
Bag No. 9 minus 1½ ounces	Bag No. 29 minus ¾ ounce
Bag No. 10 minus 1¾ ounces	Bag No. 30 minus ¾ ounce
Bag No. 11 minus 1¼ ounces	Bag No. 31 minus ¾ ounce
Bag No. 12 minus 1 ounce	Bag No. 32 minus 1¾ ounces
Bag No. 13 minus 1¾ ounces	Bag No. 33 minus 1½ ounces
Bag No. 14 minus 1¾ ounces	Bag No. 34 minus ¾ ounce
Bag No. 15 minus 1¾ ounces	Bag No. 35 minus 1½ ounce
Bag No. 16 minus 1¾ ounces	Bag No. 36 minus 1¾ ounces
Bag No. 17 minus 2¼ ounces	Bag No. 37 minus 2¾ ounces
Bag No. 18 minus ¾ ounce	Bag No. 38 minus 2 ounces
Bag No. 19 minus 1½ ounces	Bag No. 39 minus 2¼ ounces
Bag No. 20 minus 1¼ ounces	Bag No. 40 minus 2¼ ounces

This was a random sampling of an 1140 bag lot. The lot was removed from sale in accordance with Section 12211 of the California Business and Professions Code.

(b) Flour, Self rising Pillsbury's Best, The Pillsbury Company, 5 pound bags, Code No. F2G08

Bag No. 1 minus $\frac{7}{8}$ ounce	Bag No. 8 minus $1\frac{1}{2}$ ounces
Bag No. 2 minus $1\frac{1}{4}$ ounces	Bag No. 9 minus $1\frac{1}{2}$ ounces
Bag No. 3 minus $\frac{3}{4}$ ounce	Bag No. 10 minus $1\frac{1}{8}$ ounces
Bag No. 4 minus 2 ounces	Bag No. 11 minus 2 ounces
Bag No. 5 minus $1\frac{3}{4}$ ounces	Bag No. 12 minus $1\frac{5}{8}$ ounces
Bag No. 6 minus $1\frac{1}{4}$ ounces	Bag No. 13 minus $1\frac{3}{4}$ ounces
Bag No. 7 minus $\frac{7}{8}$ ounce	Bag No. 14 minus $1\frac{5}{8}$ ounces
	Bag No. 15 minus $1\frac{1}{2}$ ounces

This was a random sampling of a 200 bag lot. The lot was removed from sale in accordance with Section 12211 of the California Business and Professions Code.

(c) Flour, All Purpose Pillsbury's Best, The Pillsbury Company 10 pound bags, Code B2G16

Bag No. 1 minus $1\frac{3}{4}$ ounces	Bag No. 6 minus $1\frac{5}{8}$ ounces
Bag No. 2 minus $1\frac{1}{4}$ ounces	Bag No. 7 minus $2\frac{1}{4}$ ounces
Bag No. 3 minus $1\frac{1}{2}$ ounces	Bag No. 8 minus $2\frac{1}{2}$ ounces
Bag No. 4 minus $1\frac{1}{2}$ ounces	Bag No. 9 minus $\frac{7}{8}$ ounce
Bag No. 5 minus 1 ounce	Bag No. 10 minus 1 ounce

This was a random sampling of a 35 bag lot. The lot was removed from sale in accordance with Section 12211 of the California Business and Professions Code.

(d) Flour, Whole Wheat Flour, The Pillsbury Company 5 pound bag, Code #F22S15

Bag No. 1 minus $\frac{1}{8}$ ounce	Bag No. 6 minus $\frac{1}{8}$ ounce
Bag No. 2 minus $\frac{5}{8}$ ounce	Bag No. 7 minus $\frac{1}{2}$ ounce
Bag No. 3 minus $\frac{1}{8}$ ounce	Bag No. 8 minus $1\frac{3}{8}$ ounces
Bag No. 4 minus $\frac{1}{4}$ ounce	Bag No. 9 minus 1 ounce
Bag No. 5 minus $\frac{7}{8}$ ounce	Bag No. 10 minus $\frac{5}{8}$ ounce

This was a random sampling of a 45 bag lot. The lot was removed from sale in accordance with Section 12211 of the California Business and Professions Code.

(e) Flour, unbleached, Pillsbury's Best, Pillsbury Company 5 pound bag, Code #62607

Bag No. 1 minus $1\frac{1}{8}$ ounces	Bag No. 6 minus $\frac{3}{4}$ ounce
Bag No. 2 minus $1\frac{1}{8}$ ounces	Bag No. 7 minus $1\frac{3}{4}$ ounces
Bag No. 3 minus $\frac{7}{8}$ ounce	Bag No. 8 minus 1 ounce
Bag No. 4 minus $\frac{5}{8}$ ounce	Bag No. 9 minus $\frac{3}{4}$ ounce
Bag No. 5 minus 1 ounce	Bag No. 10 minus $\frac{1}{2}$ ounce

This was a random sampling of an 80 bag lot. The lot was removed from sale in accordance with Section 12211 of the California Business and Professions Code.

5. On October 17, 1972, in the ordinary course of his business, he went to the A. M. Lewis Company warehouse, 2727 Kansas Street, Riverside, California, and with the assistance of Weights and Measures' Inspector S. B. Otterness, also of the Riverside County Department of Weights and Measures, inspected the following items for correct and accurate quantity.

(a) Flour, all purpose, Gold Medal, General Mills, Inc., 10 pound bags, Code B231A1, B224A1

Bag No. 1 minus $1\frac{3}{4}$ ounces	Bag No. 26 minus $1\frac{1}{4}$ ounces
Bag No. 2 minus $1\frac{1}{8}$ ounces	Bag No. 27 minus $1\frac{7}{8}$ ounces
Bag No. 3 minus $1\frac{1}{4}$ ounces	Bag No. 28 minus $\frac{1}{2}$ ounce
Bag No. 4 minus $1\frac{1}{2}$ ounces	Bag No. 29 minus $\frac{3}{4}$ ounce
Bag No. 5 minus $1\frac{5}{8}$ ounces	Bag No. 30 minus $1\frac{1}{8}$ ounces
Bag No. 6 minus $\frac{7}{8}$ ounce	Bag No. 31 minus $1\frac{1}{4}$ ounces
Bag No. 7 minus $\frac{7}{8}$ ounce	Bag No. 32 minus $\frac{3}{4}$ ounce
Bag No. 8 minus $1\frac{1}{8}$ ounces	Bag No. 33 minus $1\frac{1}{2}$ ounces
Bag No. 9 minus $1\frac{1}{2}$ ounces	Bag No. 34 minus $2\frac{1}{8}$ ounces
Bag No. 10 minus $\frac{3}{4}$ ounce	Bag No. 35 minus $1\frac{1}{2}$ ounces
Bag No. 11 minus $\frac{7}{8}$ ounce	Bag No. 36 minus $1\frac{1}{8}$ ounces
Bag No. 12 minus $\frac{7}{8}$ ounce	Bag No. 37 minus $1\frac{3}{8}$ ounces
Bag No. 13 minus $1\frac{1}{8}$ ounce	Bag No. 38 minus $1\frac{1}{8}$ ounces



Bag No. 14 minus 1¼ ounces	Bag No. 39 minus 1¼ ounces
Bag No. 15 minus ¾ ounce	Bag No. 40 minus 1¼ ounces
Bag No. 16 minus ¾ ounce	Bag No. 41 minus 2¾ ounces
Bag No. 17 minus 1½ ounces	Bag No. 42 minus ¾ ounce
Bag No. 18 minus 1¼ ounces	Bag No. 43 minus 1¼ ounces
Bag No. 19 minus 1½ ounces	Bag No. 44 minus ¾ ounce
Bag No. 20 minus 1¾ ounces	Bag No. 45 minus 1¼ ounces
Bag No. 21 minus 1½ ounces	Bag No. 46 minus ¾ ounce
Bag No. 22 minus 1¾ ounces	Bag No. 47 minus ¾ ounce
Bag No. 23 minus 1½ ounces	Bag No. 48 minus ¾ ounce
Bag No. 24 minus 1¾ ounces	Bag No. 49 minus 1¾ ounces
Bag No. 25 minus 1 ounce	Bag No. 50 minus 1½ ounces

This was a random sampling of a 2865 bag lot. The lot was removed from sale in accordance with Section 12211 of the California Business and Professions Code.

(b) Flour, unbleached, Pillsbury's Best, The Pillsbury Company 5 pound bags, Code #F2G22, G2G21

Bag No. 1 minus ¾ ounce	Bag No. 16 minus ¾ ounce
Bag No. 2 plus 0 ounces	Bag No. 17 minus 7⁄8 ounce
Bag No. 3 minus 1 ounce	Bag No. 18 minus 7⁄8 ounce
Bag No. 4 minus 2 ounces	Bag No. 19 minus ¾ ounce
Bag No. 5 plus 1⁄8 ounce	Bag No. 20 minus ¾ ounce
Bag No. 6 minus 1¾ ounces	Bag No. 21 minus ¾ ounce
Bag No. 7 plus ¼ ounce	Bag No. 22 minus ½ ounce
Bag No. 8 minus 1½ ounces	Bag No. 23 minus 1½ ounces
Bag No. 9 minus 1 ounce	Bag No. 24 minus 1 ounce
Bag No. 10 minus 1¾ ounces	Bag No. 25 minus 7⁄8 ounce
Bag No. 11 minus 1¾ ounces	Bag No. 26 minus 1¼ ounces
Bag No. 12 minus 1¼ ounces	Bag No. 27 minus 7⁄8 ounce
Bag No. 13 minus 2 ounces	Bag No. 28 minus 1½ ounces
Bag No. 14 minus 1½ ounces	Bag No. 29 minus ¾ ounce
Bag No. 15 minus 1¾ ounces	Bag No. 30 minus 1 ounce

This was a random sample of an 800 bag lot. The lot was removed from sale in accordance with Section 12211 of the California Business and Professions Code.

6. On November 28, 1972, in the ordinary course of his business he went to the A. M. Lewis Company

warehouse, 2727 Kansas Street, Riverside, California, and with the assistance of Weights and Measures' Inspector, S. B. Otterness, also of the Riverside County Department of Weights and Measures, inspected the following items for correct and accurate quantity.

(a) Flour, enriched, Gold Medal General Mills, Inc. 50 pound cloth bag, Code D225A1

Bag No. 1 minus 6 ounces	Bag No. 7 minus 6 ounces
Bag No. 2 minus 2 ounces	Bag No. 8 minus 2 ounces
Bag No. 3 minus 4 ounces	Bag No. 9 plus 0 ounces
Bag No. 4 minus 4 ounces	Bag No. 10 minus 4 ounces
Bag No. 5 plus 0 ounces	Bag No. 11 minus 8 ounces
Bag No. 6 minus 8 ounces	Bag No. 12 plus 0 ounces

This was a random sample of a 19 bag lot. The lot was removed from sale in accordance with Section 12211 of the California Business and Professions Code.

(b) Flour, unbleached, Pillsbury Company 5 pound bag, Code #G2G05

Bag No. 1 minus 17⁄8 ounces	Bag No. 16 minus 1 ounce
Bag No. 2 minus 7⁄8 ounce	Bag No. 17 minus 1½ ounces
Bag No. 3 minus ½ ounce	Bag No. 18 plus 5⁄8 ounce
Bag No. 4 minus 15⁄8 ounces	Bag No. 19 minus 1½ ounces
Bag No. 5 minus 1½ ounces	Bag No. 20 minus ½ ounce
Bag No. 6 minus 1¾ ounces	Bag No. 21 minus 1¼ ounces
Bag No. 7 minus 15⁄8 ounces	Bag No. 22 minus ¼ ounce
Bag No. 8 minus 2¼ ounces	Bag No. 23 minus 1¼ ounces
Bag No. 9 minus 1¾ ounces	Bag No. 24 minus 1½ ounces
Bag No. 10 minus 1 ounce	Bag No. 25 minus 7⁄8 ounce
Bag No. 11 minus 1½ ounces	Bag No. 26 minus 1¼ ounces
Bag No. 12 minus 7⁄8 ounce	Bag No. 27 minus 1¾ ounces
Bag No. 13 minus ½ ounce	Bag No. 28 minus 5⁄8 ounce
Bag No. 14 plus ½ ounce	Bag No. 29 minus 5⁄8 ounce
Bag No. 15 minus 1½ ounces	Bag No. 30 minus 1 ounce

This was a random sample of an 800 bag lot. The lot was removed from sale in accordance with Section 12211 of the California Business and Professions Code.



(c) Flour, enriched, Gold Medal, General Mills, Inc. 50 pound cloth bag, Code #D225A1

Bag No. 1 minus 12 ounces	Bag No. 6 minus 10 ounces
Bag No. 2 minus 20 ounces	Bag No. 7 minus 6 ounces
Bag No. 3 minus 12 ounces	Bag No. 8 minus 8 ounces
Bag No. 4 minus 6 ounces	Bag No. 9 minus 12 ounces
Bag No. 5 minus 6 ounces	Bag No. 10 minus 8 ounces

This was a random sample of an 18 bag lot. The lot was removed from sale in accordance with Section 12211 of the California Business and Professions Code.

(d) Flour, Gold Medal, General Mills, Inc. 10 pound bags, No Code.

Bag No. 1 plus 0 ounces	Bag No. 23 plus 0 ounces
Bag No. 2 minus ¼ ounce	Bag No. 24 plus 0 ounces
Bag No. 3 plus ⅛ ounce	Bag No. 25 minus ⅜ ounce
Bag No. 4 minus ¼ ounce	Bag No. 26 minus ⅜ ounce
Bag No. 5 minus ½ ounce	Bag No. 27 minus ⅛ ounce
Bag No. 6 minus ⅛ ounce	Bag No. 28 minus ⅜ ounce
Bag No. 7 minus ⅛ ounce	Bag No. 29 plus 0 ounces
Bag No. 8 plus ¾ ounce	Bag No. 30 minus ½ ounce
Bag No. 9 plus ½ ounce	Bag No. 31 minus 1 ounce
Bag No. 10 plus ⅞ ounce	Bag No. 32 minus ⅝ ounce
Bag No. 11 plus 0 ounces	Bag No. 33 minus ⅜ ounce
Bag No. 12 plus ⅝ ounce	Bag No. 34 minus ¾ ounce
Bag No. 13 plus 0 ounces	Bag No. 35 minus ⅛ ounce
Bag No. 14 minus ⅛ ounce	Bag No. 36 minus ⅛ ounce
Bag No. 15 plus ⅛ ounce	Bag No. 37 minus ⅜ ounce
Bag No. 16 minus ⅜ ounce	Bag No. 38 minus ¼ ounce
Bag No. 17 minus ¼ ounce	Bag No. 39 minus 1 ⅛ ounces
Bag No. 18 minus ⅛ ounce	Bag No. 40 minus ⅛ ounce
Bag No. 19 minus 4 ⅛ ounces	Bag No. 41 plus ¾ ounce
Bag No. 20 plus 0 ounces	Bag No. 42 plus ⅞ ounce
Bag No. 21 minus ⅛ ounce	Bag No. 43 plus ¼ ounce
Bag No. 22 minus ¼ ounce	Bag No. 44 minus ½ ounce
	Bag No. 45 minus ⅛ ounce

This was a random sample of an 1100 bag lot. The lot was removed from sale in accordance with Section 12211 of the California Business and Professions Code.

8. In each of the above-mentioned inspections he used an equal arm knife-edged balance or a knife-edged platform type balance for the purpose of weighing the quantities of food stuffs hereinabove set forth. Said equal-arm balance is marked in units of 1/8 ounce. Said platform type balance is marked in units of 1 ounce. In each case hereinabove set forth, he read and interpreted the scale on the said balances in favor of the packing company where the indicator on said balances was between scale divisions. In other words, he read the scale as the lower number of short weight rather than the higher number where the indicator was between scale divisions.

9. In each case hereinabove set forth the bags of food stuff picked to be inspected were taken by the use of a random table of numbers or by visual random picking of the bags.

10. In making his off-sale orders as above described, he relied solely upon the authority granted to the Director of Weights and Measures under Section 12211 of the California Business and Professions Code.

11. Off-sale orders are attached hereto marked Exhibit "B", and incorporated herein by reference.

Executed on this 19th day of April, 1973, at Riverside, California.

/s/ Erwin V. Miller  
ERWIN V. MILLER

Subscribed and sworn to before me this 19th day of April, 1973.

/s/ Anita L. Fullinwider  
ANITA L. FULLINWIDER

Notary Public in and for Said County and State

[Seal]

CALIFORNIA DEPARTMENT OF AGRICULTURE  
BUREAU OF WEIGHTS AND MEASURES

OFF SALE ORDER

COUNTY Riverside No. 001802

DATE 10-16-72 TIME 100 <sup>AM</sup> P.M.

1. TO A M Lewis  
ADDRESS 2727 Kansas  
Riverside

2. A M Lewis  
ADDRESS 2727 Kansas  
Riverside

WARNING Under authority of Secs. 12025.5, B & P Code  
This lot has been ordered off sale. Do not remove this tag or in any way dispose of the containers without authorization from a Weights and Measures Official. (Sec. 12025.5, B & P Code of Calif. Maximum penalty \$500.00 or 6 months in jail or both.)

COMMODITY Flour BRAND NAME Gold Medal  
PACKER/ADDRESS General Mills  
Minneapolis, Minn. 55440

NUMBER OF CONTAINERS 1140 MARKED CONTENT 10 lb  
OTHER IDENTIFICATION C257A1, A212A1  
EXACT LOCATION flour section

VIOLATION(S) Sec. 12024 Calif.  
B & P Code - Short wt.

HOLD TAG ISSUED YES ☒ NO ☐ (OFFICER) Blumen  
ADDRESS 2950 Washington PHONE 777-2630

I HEREBY AGREE TO Hold until  
released by W & M

(SIGNED) [Signature] POSITION \_\_\_\_\_  
WHITE - To County Sealer issuing order  
GOLDENROD - To County or State of Final Destination  
PINK - To State Bureau of Weights and Measures  
YELLOW - To Person in Possession  
CARD - To Issuing County after Receipt  
524-002 Rev. 10/71

ARTICLE V PACKAGE INSPECTION REPORT	DATE	TIME	CATEGORY NO.
20615 1802	10/16/73	—	6, 06
COUNTY	Revenue		

PACKER	General Mills, Inc.	ADDRESS	Minneapolis, Minn 554
DISTRIBUTOR	A M Lewis	ADDRESS	Kansas, Revenue
DEALER		ADDRESS	
BRAND NAME	Gold Medal	COMMODITY	all purpose flour
OTHER IDENTIFICATION—CODE SYMBOL	C207A1, 0213A1	CONTAINER DESCRIPTION	paper bag
		MARKED CONTENTS	10 lb

LOT, SAMPLE & TARE SAMPLE SIZES	1140 40 5	PACKAGES REJECTED	(40) 1140
UNIT OF MEASURE	1/2 lb	PACKAGES WEIGHED OR MEASURED IN SAMPLING	(40) 40
PRICE PER UNIT, \$	1.00	LOT PASSED	<input type="checkbox"/> LOT REJECTED <input checked="" type="checkbox"/> (41)
AVG. TARE	7 1/2 5 = 1 1/2 5	HOW MANY HOLD TAGS ISSUED	1

	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	PRELIM.	CORR.
+	12	11	10	11	12	13	12	13	12	13	12	13	12	13	12	98	+
+	12	11	10	11	12	13	12	13	12	13	12	13	12	13	12	112	+
+	11	12	11	10	11	12	13	12	13	12	13	12	13	12	13	95	+
+	14	13	12	11	12	13	12	13	12	13	12	13	12	13	12	95	+
+	12	11	10	11	12	13	12	13	12	13	12	13	12	13	12	101	+
+	7	6	7	11	6	11	11	4								501	+
BC																-501	

AVG. RANGE—PRELIM. (15/10)	TABLE II	TOTAL ERROR—PRELIM	AVG. ERROR (15/10)	TABLE III	AVG. ERROR	TOTAL ERROR—CORR.
63, 8 = 7.87	6.53	-501	-501, 40 = 12.55			
AVG. RANGE—CORRECTED	TABLE IV	TABLE V	% OF LOT SAMPLED (15/10)	TABLE VI	TABLE VII	TABLE VIII
1			(1)			

DISPOSITION OF OFF-SALE MERCHANDISE:		3. To be shipped on or about _____ to distributor <input type="checkbox"/>	
1. Corrected and released for sale this date _____ <input type="checkbox"/>		Packer <input type="checkbox"/>	
2. To be corrected locally on or about _____ by _____		4. Disposition not determined. Lot is not to be moved or in any way disposed of without written authorization from this office. <input checked="" type="checkbox"/>	
Packer <input type="checkbox"/> Distributor <input type="checkbox"/> Dealer <input type="checkbox"/>			

INVESTIGATION OF COMPLAINT FROM	INITIATED BY	THEIR OSO NO.	PHONE CALL/LETTER DATED
Remarks: Total Error minus			
No. of unreasonable minus errors			
exceeds tare sample size			
Shipped to General Mills 4309 Fruitland St 4-3-73 00133			
Owner or Agent	Title	SEALER: O W Jones	
This is to Certify that in accordance with the law, I have tested, weighed, or inspected packages, or containers and have passed, seized, or condemned them as above set forth.		By: J B Otterson	

WHITE—COUNTY RECORD	CALIFORNIA DEPARTMENT OF AGRICULTURE	EXHIBIT 1134
YELLOW—TO STATE	BUREAU OF WEIGHTS AND MEASURES	-18- 54
PINK—TO STATE - OR TO		

BEST COPY AVAILABLE



CERTIFICATE OF SERVICE BY  
MAIL AND EXHIBITS B 14-23  
ARE OMITTED.

**Affidavit of Donald B. Colpitts in Opposition to  
Preliminary Injunction.**

United States District Court, Central District of California.

General Mills, Inc., a corporation; The Pillsbury Company, a corporation; Seaboard Allied Milling Corporation, a corporation, Plaintiffs and Counterdefendants, vs. Joseph W. Jones, as Director of the County of Riverside Department of Weights and Measures, Defendant and Counterclaimant. Civil Action No. 73-715-R.

State of Minnesota, County of Hennepin—ss:

DONALD B. COLPITTS, being first duly sworn according to law, deposes and says:

I reside at 17830-24th Ave. No., Wayzata, Minnesota 55391. I am a graduate of Whitworth College, located in Spokane, Washington, where I majored in chemistry and received the degree of Bachelor of Science in 1939. I am a member of the American Association of Cereal Chemists, and have served as Secretary, Treasurer, Vice-Chairman and Chairman of the Pacific-Northwest regional section of that association.

I have been employed by General Mills, Inc. since 1939. From 1939 to 1948, except for a period of about four years of military service, I was employed in the capacity of cereal chemist; from 1948 to 1964 I was Quality Control Manager of the flour mill of General Mills, Inc., at Spokane, Washington; from 1964 to 1965 I was Supervisor of the Physical Testing Laboratory in the Quality Control Department of General Mills, Inc. in Minneapolis; and since 1965 I have been and am Technical Manager, Weights & Measures, for General Mills, Inc.

My present duties include, among others, supervision of the weight quality attributes of family flour products, supervision of the physical testing laboratory of the Quality Control Department and Technical Services, and supervision over the experimental bake shop and the commercial bake shop, all at the James Ford Bell Technical Center of General Mills, Inc. in Golden Valley, Minnesota.

I am familiar with the custom and practice followed by plaintiffs in the process of wheat flour milling, weighing and packaging, and with the equipment used. All flour ordered off-sale in Riverside County was "family flour"—that is, it was to be sold at retail. All this flour was made in states of the United States; none was made in a Territory of the United States.

The raw material from which wheat flour is made is the kernel (or berry) of wheat plant. A kernel of wheat is composed of three major parts. About 83 per cent is endosperm, which is the part from which white flour is made; about 14½ per cent is pericarp, sometimes referred to as bran, being the outside portion of the kernel, principally used for animal feed; and about 2½ per cent is wheat germ. As acquired by plaintiffs from the farmer or grain merchant, the kernel normally has a moisture content in the range of 10-14.5 per cent by weight, averaging about 12½ per cent.

In the milling operation the objective is to separate and process these parts of the kernel into the desired products. In a modern mill this is accomplished by highly mechanized machinery and equipment. Wheat flour is made by milling (grinding) the wheat kernel and by sifting (bolting) and separating the bran and

the germ from the endosperm—the latter becoming the flour.

In order to make the required separation and to obtain the best milling results it is necessary that the wheat to be milled be "tempered" by adding a carefully calculated amount of water to the wheat and allowing the wheat to set in tempering bins long enough for the moisture to penetrate the wheat kernel, toughen the bran coat and germ to facilitate separation, and render the endosperm more friable for easier and better reduction into the fine particles required for flour. Wheat usually is tempered to around 15 to 16 per cent moisture for best milling results. The amount of water to be added depends on the moisture content of the wheat, the kind of wheat, the desired mix of products, relative humidity conditions in the mill, and the judgment of the miller.

If not enough water is added, the pericarp will not be sufficiently toughened, some bran will break down into flour size particles and mix in with the flour, and the endosperm will not be sufficiently friable, or "mellow", for optimum reduction. If too much water is added, too much of the endosperm will adhere to the bran, making an optimum separation of the endosperm from the pericarp impossible and therefore decreasing the yield of flour.

In the course of the milling operation the moisture content of the tempered wheat decreases. Flour comes off the mill and flows to the weighing and packing machinery at approximately 13 to 14 per cent moisture content.

Under the definitions and standards of identity established for wheat flours by the Food and Drug Adminis-



tration pursuant to the Federal Food, Drug and Cosmetic Act (21 C.F.R. Part 15, Subpart A) the maximum moisture content of wheat flour is 15 per cent. However, flour of a kind involved in this action is not produced with a moisture content as high as 15 per cent because to bring flour off the mill with a moisture content that high would require so high a moisture content in the tempered wheat as to foreclose good milling results.

The following Findings of Fact, printed in the Federal Register of Tuesday, May 27, 1941, at the time of adoption of Part 15, are descriptive of today's practices:

*"Findings of Fact"*

- "1. The food commonly and usually known as 'flour', 'white flour', 'wheat flour', or 'plain flour', is manufactured from wheat, both hard and soft, other than durum wheat and red durum wheat.
- "3. In making flour the wheat is first cleaned. It is usually tempered. It is then ground and bolted so as to separate the inner portion of the wheat berry, known as the endosperm, from the outer portions, known as the bran coat, or from both bran coat and germ. Flour consists essentially of finely ground endosperm. In the milling process the separation of bran coat and germ from endosperm is never complete, but a certain degree of separation is necessary to produce flour which will make acceptable white bread and biscuit.
- "4. Where all the flour milled from the wheat used is combined without separation into grades, the flour is called 'straight flour'. That portion which

is most nearly free of bran coat and germ is frequently taken off and sold as 'patent flour'. The remaining portion, which contains more bran coat and germ than straight flour, is known as 'clear flour'.

- "5. 'Straight flours' will make acceptable white bread and biscuit. As the degree of removal of bran coat and germ is lessened, flours become progressively less desirable for such purposes until so much bran coat and germ remain that acceptable white bread and biscuit cannot be made. However, such products are suitable for other food uses and are usually sold under such designations as 'low-grade flour' and 'second clear flour'. Products containing even more bran coat and germ are sold usually as animal feed."

The following Findings of Fact (from the source cited above) also are descriptive of today's practices, except that the Air Oven Method has become equally acceptable with the Vacuum Oven Method:

- "12. All flour contains some moisture. Excessive moisture, however, impairs the keeping quality of flour and unnecessarily increases its weight. A reasonable limit for moisture, which is not exceeded in good milling practice, is 15 per cent.
- "16. A satisfactory and reliable method for determination of moisture in flour is that prescribed in the book 'Official and Tentative Methods of Analysis of the Association of Official Agricultural Chemists', 4th Edition, 1935, page 206, under the caption 'Vacuum Oven Method—Official'. The same method has recently been re-

published in the book 'Official and Tentative Methods of Analysis of the Association of Official Agricultural Chemists', 5th Edition, 1940, page 211, under the caption 'Vacuum Oven Method—Official'. This method is well-known and widely used when examining flour for its moisture content."

Flour has the capacity and tendency to gain or lose moisture depending upon the atmospheric conditions surrounding it. The rate of moisture loss or gain depends upon the temperature and the amount of moisture in the air around it. A particular package of flour will therefore vary in weight from time to time depending on the relative humidity to which it is exposed. If the weight of the contents of the package when packed is equal to the stated net weight, and if it is thereafter held in a warehouse or on a retail shelf in an area of low relative humidity, evaporation will occur and the weight of the contents will decline accordingly. Upon subsequent exposure to higher relative humidities it will regain moisture, but at a slower rate.

This hygroscopic characteristic of flour is generally recognized and well documented. There have been a number of scientific and practical studies made with regard to moisture loss and gain of flour and, based upon my own familiarity with moisture loss and gain, I believe the attached Exhibits A and B accurately reflect what happens to flour under various atmospheric conditions. The essence of these exhibits, and of my experience, is that the gain or loss of moisture can cause the net weight of contents of packages of flour to fluctuate 3-4 per cent or more during the course of good distribution practice within the conti-

mental United States. It is for this reason that laws and regulations provide for reasonable variations caused by loss or gain of moisture during good distribution practices.

Exhibit A is a copy of a paper entitled "A Study of the Net Weight Changes and Moisture Content of Wheat Flour at Various Relative Humidities", by C. A. Anker and W. F. Geddes, with C. H. Bailey, reprinted from Cereal Chemistry, Vol. XIX, No. 1, January 1942, which reports the results of studies conducted under controlled humidity conditions to determine the changes in net weight and moisture content of an 83 per cent patent flour, commercially milled from a blend of hard red spring and hard winter wheats for the family trade and normally sold in 5, 10 and 24½ pound paper and cotton sacks. The kinds of flour and packages used in the studies were similar to those described in the counterclaim, motion for preliminary injunction and supporting affidavits filed by the defendant and counterclaimant in this action. This Anker, Geddes and Bailey paper has been and is now accepted in scientific circles as an authoritative treatise on the hygroscopicity of flour.

Table IX (at page 147) of the Anker, Geddes and Bailey paper shows the percentage of overpacking that would be required to insure 100 per cent of the required weight at varying relative humidities with flour packed at moisture contents of from 13.0 per cent to 15.0 per cent. The table demonstrates that flour packed at 13.5 per cent moisture content would have to be maintained at a relative humidity of over 60 per cent to prevent loss in weight. Overpacking of 8.8 per cent would be required if the flour were maintained in a relative humidity of 10 per cent, as



compared to a required overpack of only 0.3 per cent if maintained in a relative humidity of 60 per cent. If maintained in relative humidities above 60 per cent no evaporation would occur and no overpacking would be required.

Exhibit B is entitled "Report of Flour Test" and was furnished to me in 1969 by the head of Weights and Measures of the State of Colorado, who stated that he had caused the tests to be conducted. This shows the weight of four sacks of flour taken on weekdays from April 17, 1969 through May 7, 1969, as well as the relative humidity and the temperature in degrees Fahrenheit on each such day.

Unless the relative humidity of the atmosphere at any particular location is rigidly controlled by artificial means, which is difficult if not impossible to accomplish, the relative humidity at that location will vary from time to time, almost always from night to day and vice versa, usually from day to day, and often from hour to hour.

The relative humidity of the unenclosed or outside atmosphere in some areas in the United States during some seasons sometimes falls below the 60 per cent "equilibrium" point required to prevent loss of weight by evaporation in flour packed at 13.5 per cent moisture content. The relative humidity in warehouses and retail stores in the United States sometimes falls below the relative humidity of the outside atmosphere in the same area. Heating, ventilating, air conditioning and artificial humidification of a warehouse or store in any area will affect the relative humidity in such warehouse or store. Relative humidities as low as 30 per cent, or lower, even though not customary, sometimes occur in some warehouses and retail stores in some areas.

When the contents of a package of flour lose weight by reason of exposure to an atmosphere having a low relative humidity, nothing is lost but moisture. All ingredients contained in the package when packed, whether extracted from the wheat or added in the manufacturing process, except some part of the moisture, remain in the package. The nutritional value is the same. Flour as such is not consumed separately as a human food but is invariably used as an ingredient in preparing some other food, and water or some other liquid or both are invariably added in the process. The consumer loses nothing of value by reason of the evaporation. When flour is used a slight increase in water added compensates for any moisture loss.

If the moisture content of packaged flour at the time of packing is known, if the weight of the flour at a later time is determined, and if the moisture content of the flour at such later time is also determined, the weight of the flour at the time of packing can be accurately determined mathematically.

On October 24, 1972, together with Charles E. Joyce of The Pillsbury Company, and Henry Sumpter, Jr. of Seaboard Allied Milling Corporation, I called upon Joseph W. Jones, Director, Riverside County Department of Weights and Measures, for the purpose of securing his cooperation in obtaining samples of flour which Mr. Jones' office had ordered off-sale as being short-weight on October 16 and 17, 1972. Mr. Jones assigned an inspector who went with the three of us to the A. M. Lewis warehouse, 2727 Kansas, Riverside, and to the Certified Grocers warehouse, 1990 Pomona Rincon Road, Corona. At each of these warehouses, the inspector selected unopened bags at random from the lots which had been ordered off-sale, the



inspector initialed each bag, and we three milling representatives then took these bags to Geo. W. Gooch Laboratories, Ltd. in Los Angeles, California, where we explained to the laboratory representatives that we desired gross, tare and net weights of each bag as is, and a thorough mixing of each bag's contents in order to obtain a sample from each bag for Gooch to run a moisture determination using an official method of the Association of Official Agricultural Chemists.

Exhibit A attached to the Affidavit of Roger C. Miller is a copy of the Gooch Laboratories' report as to these samples of flour.

I ascertained from the General Mills records the milling moisture content for the date indicated for those bags of General Mills flour for which a code was provided (and used the lowest of these milling moistures for the samples from the lot where no code was noted) and I calculated the net weight of contents at which each bag sampled was packed. These calculations show that each package of General Mills flour which was ordered off-sale bore a label containing an accurate statement of the quantity of the contents in terms of weight when packed, distributed and sold by General Mills, Inc., as shown on the attached Exhibit C.

None of the General Mills flour was owned or controlled by General Mills, Inc. when inspected by Jones.

All the weight shortages supposedly found by Jones' inspectors in packages of General Mills flour (averaging between .125 per cent and 1.250 per cent per lot) were well within the range of reasonable variation from labeled net weight which occurs to flour by loss of moisture during the course of good distribution practices.

I also ascertained from Charles E. Joyce the milling moisture content for the date indicated for those bags of Pillsbury flour which had been ordered off-sale, and I also ascertained from Henry Sumpter, Jr. the milling moisture content for the date indicated for those bags of Seaboard Allied flour which had been ordered off-sale, and I calculated the net weight of contents at which each bag sampled was packed. These calculations show that each package of Pillsbury and/or Seaboard Allied flour which was ordered off-sale bore a label containing an accurate statement of the quantity of the contents in terms of weight when packed, distributed and sold by the Pillsbury Company or Seaboard Allied Milling Corporation, as shown on the attached Exhibit C.

/s/ Donald B. Colpitts  
Donald B. Colpitts

Sworn to and subscribed before me this 14th day of May, 1973.

/s/ Annabelle J. Johnson  
Notary Public

/s/ Annabelle J. Johnson  
Notary Public

ANNABELLE J. JOHNSON

**Affidavit of Joseph W. Jones.\***

United States District Court, Central District of California.

General Mills, Inc., a corporation; The Pillsbury Company, a corporation; Seaboard Allied Milling Corporation, a corporation, Plaintiffs, vs. Joseph W. Jones, as Director of the County of Riverside Department of Weights and Measures, Defendant.

Joseph W. Jones, as Director of the County of Riverside Department of Weights and Measures, Counterclaimant, vs. General Mills, Inc., a corporation; The Pillsbury Company, a corporation; Seaboard Allied Milling Corporation, a corporation, Counterdefendants. Civil Action No. 73-715-R.

State of California, County of Riverside—ss.

Joseph W. Jones, being first duly sworn, states as follows:

1. He is the defendant and counterclaimant in this proceeding. He is now and at all times herein mentioned was the duly appointed, qualified and acting Director of the Department of Weights and Measures for the County of Riverside, State of California.

2. The purpose of this affidavit is to explain the procedures followed in Riverside, California, in the handling by a retailer or distributor of packaged food products after such packages are ordered off-sale by the Riverside County Director of Weights and Measures.

3. The manager of the retail establishment or of the distributing company is informed by the inspector

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\*Certificate of service by mail is omitted.

from the Department of Weights and Measures that the merchandise has failed to qualify under accepted checking procedures and that it is therefore off-sale. The reasons for the failure to qualify are explained to the manager. He is advised that the merchandise must be removed from the sales area of the store until the misbranding is corrected or until the manager has disposed of the merchandise. The manager is informed as to the alternatives available under California law to bring the off-sale merchandise into compliance.

4. The manager may return the product to the distributor or packer from whom procured; or he may re-mark each package with an accurate statement of the quantity; he may dump or destroy the product; or he may "bulk the product out" and sell in that state. Most managers choose to return the product unopened to the packer or his distributor. Some managers avail themselves of the other options, especially if only a small number of packages are involved. It is the policy of Jones' office to make clear to the store manager that the off-sale merchandise still belongs to the store even though ordered off-sale and that the retention or disposition of the merchandise within the limitations imposed by law is simply a matter of the store's own choice. Certain products cannot be re-marked because of the restrictions imposed by Business and Professions Code, section 13000, which restricts the size of packages in which flour may be sold to five, ten, twenty-five, fifty and one hundred pound packages.

5. The manager is required to notify Jones' office as to when he will pick up the off-sale merchandise, the name of the carrier, the destination of the product,

and its approximate arrival time. Jones' office receives many inquiries from retailers and distributors as to the methods available for the handing of off-sale merchandise. Advice is given as above outlined.

Executed on this 6th day of August, 1973, at Riverside, California.

/s/ Joseph W. Jones

Joseph W. Jones

Subscribed and sworn to before me this 6th day of August, 1973.

/s/ Anita L. Fullinwider

ANITA L. FULLINWIDER

Notary Public in and for  
said County and State

[Seal]

### **Findings of Fact and Conclusions of Law.**

United States District Court, Central District of California.

General Mills, Inc., a corporation; The Pillsbury Company, a corporation; Seaboard Allied Milling Corporation, a corporation, Plaintiffs and Counterdefendants, vs. Joseph W. Jones as Director of the County of Riverside Department of Weights and Measures, Defendant and Counterclaimant. Civil Action No. 73-715-R.

### **FINDINGS OF FACT**

1. Plaintiff General Mills, Inc. is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business in the State of Minnesota. Plaintiff The Pillsbury Company is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business in the State of Minnesota. Plaintiff Seaboard Allied Milling Corporation is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business in the State of Massachusetts.

2. Defendant Joseph W. Jones, hereafter Jones, is Director of the County of Riverside Department of Weights and Measures and is a California citizen.

3. This action was instituted and arises under 21 U.S.C. §§ 301-392 (the Federal Food, Drug, and Cosmetic Act); this action is between citizens of different states; the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs; jurisdiction of this Court is based on 28 U.S.C. §§ 1331(a) and 1332(a); and venue is based on 28 U.S.C. § 1391. This is a civil action for a judgment



declaring the rights and other legal relations of the parties hereto, pursuant to 28 U.S.C. §§ 2201 and 2202, in respect to an actual controversy between them which is within the jurisdiction of this Court. The Court has jurisdiction as to the counterclaim filed by Jones under 21 U.S.C. § 332 and has pendent or ancillary jurisdiction.

4. The flour in issue is a "food" under the Federal Food, Drug and Cosmetic Act [21 U.S.C. § 321(f)]; it is a "consumer commodity" under the federal Fair Packaging and Labeling Act [15 U.S.C. § 1459(a)]; and it conforms to definitions and standards of identity set forth in regulations (21 C.F.R. Part 15, Subpart A) of the Secretary of Health, Education and Welfare promulgated under the Federal Food, Drug and Cosmetic Act.

5. At all times pertinent to this proceeding, plaintiffs and counterdefendants and each of them, were engaged in the business of processing, packaging, selling, distributing and otherwise disposing of packages of wheat flour to the general public and to others for resale to the general public within the County of Riverside, State of California.

6. When introduced or delivered for introduction into commerce by the plaintiff and counterdefendant who manufactured it, each package of flour involved herein bore a label containing, among other things, a statement of the quantity of the contents in terms of weight, such as 2 pounds, 5 pounds, 10 pounds, 25 pounds and 50 pounds, and were distributed for sale to various food distributors in Riverside County, California.

7. The packages of flour mentioned in the counterclaim were inspected by inspectors employed by Jones

in his capacity of Director of the Department of Weights and Measures of the County of Riverside, thereafter the said packages were ordered "off sale" by Jones. The "off sale" orders made by the inspectors stated that the lots were ordered off sale under the authority of California Business and Professions Code, sections 12211 and 12607, and Title 4 California Administrative Code, Chapter 8, Subchapter 2, and in the manner prescribed by Business and Professions Code, section 12025.5. Said "off sale" orders were made while the goods were in the possession of distributors and not under the ownership or control of any plaintiff.

#### CONCLUSIONS OF LAW

1. Substantial doubts are created by the record in this action, involving both federal and State law, as to the merits of the relief claimed by Jones under his counterclaim. Because of such doubts, a preliminary injunction should not be granted (*Fowler v. United States* (C.D. Cal. 1966) 258 F. Supp. 638, 644).

2. No legal basis exists for a preliminary injunction at this time.

3. The status quo is that Jones is ordering flour "off sale" whenever he finds such packages to be under weight, acting pursuant to the authority of Business and Professions Code, sections 12211 and 12607, and Title 4 California Administrative Code, Chapter 8, Subchapter 2. Jones does not need a preliminary injunction to preserve this status quo pending a determination of the action on the merits, which preservation is the function of a preliminary injunction (*King v. Saddleback Junior College District* (9th Cir. 1970) 425 F.2d 426, 427).

4. Jones' motion for a preliminary injunction is denied.

Dated this 3rd day of July, 1973.

/s/ Manuel L. Real  
MANUEL L. REAL  
UNITED STATES DISTRICT JUDGE

**Amended Order.**

United States District Court, Central District of California.

General Mills, Inc., a corporation; The Pillsbury Company, a corporation; Seaboard Allied Milling Corporation, a corporation, Plaintiffs and Counterdefendants, v. Joseph W. Jones as Director of the County of Riverside Department of Weights and Measures, Defendant and Counterclaimant. Civil Action No. 73-715-R.

Pursuant to the Opinion of the United States Court of Appeals for the Ninth Circuit in cases Nos. 73-3583 and 74-1051, entered October 29, 1975, the order of this District Court in case No. 73-715-R hereby is amended to read as follows:

**IT IS ORDERED:**

(1) that the motion for a three-judge court is denied, since the constitutional issues raised in this case are not substantial;

(2) that the enforcement of valid state weights and measures laws through the use of off sale orders prior to a hearing or opportunity for judicial review does not unreasonably burden interstate commerce or violate the due process clause of the Fourteenth Amendment to the Constitution of the United States;

(3) that Title 21 Code of Federal Regulations § 1.8b(q) is valid;

(4) that, as to plaintiffs' flour products, Cal. Bus. and Prof. Code § 12211 and 4 Cal. Admin. Code, ch. 8, subch. 2 and subch. 2.1, impermissibly conflict with the standards imposed by the Food, Drug, and Cosmetic Act, the Fair Packaging and Labeling Act, and 21 C.F.R. 1.8b(q);

(5) that, as to plaintiffs' flour products, enforcement of Cal. Bus. and Prof. Code § 12607 as implemented by 4 Cal. Admin. Code, ch. 8, subch. 2 and/or subch. 2.1, impermissibly conflicts with the standards imposed by the Food, Drug, and Cosmetic Act, the Fair Packaging and Labeling Act, and 21 C.F.R. 1.8b(q);

(6) that defendant, together with his successors, deputies, inspectors, officers, agents, servants, employees, attorneys and other persons in active concert or participation with him, and each of them, are jointly and severally restrained and enjoined permanently from applying the provisions of California Business and Professions Code section 12211, and/or the provisions of California Business and Professions Code section 12607 as implemented by 4 Cal. Admin. Code, ch. 8, subch. 2 and/or subch. 2.1, and/or the provisions of Title 4, Cal. Admin. Code, ch. 8, subch. 2 and/or subch. 2.1, to the flour products of plaintiffs which have been labeled as to net weight in accordance with the provisions of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 et seq., and/or of the federal Fair Packaging and Labeling Act, and/or any valid regulation promulgated pursuant thereto;

(7) that state net quantity labeling requirements, which are not in conflict with the Federal Food, Drug, and Cosmetic Act or the federal Fair Packaging and Labeling Act or any valid regulation promulgated pursuant thereto, and which are not less stringent than or do not require information different than that required by section 4 of the federal Fair Packaging and Labeling Act or regulations promulgated pursuant thereto, may be enforced by appropriate state procedures;

(8) that the motion of defendant for summary judgment is denied;

(9) except as herein expressly provided, the motion for summary judgment of plaintiffs is denied; and

(10) the Court reserves the continuing jurisdiction to make any modification to this injunction contained herein, upon proper application by any party and consonant with the Opinion of the Court of Appeals, as the ends of justice may require.

DATED: May 13, 1976.

MANUEL L. REAL

United States District Judge

Approved as to form:

Ray T. Sullivan, Jr., County Counsel, Riverside County  
Loyal E. Keir, Deputy County Counsel

/s/ By: Loyal E. Keir

Attorneys for Joseph W. Jones

Order of United States District Court, dated September 17, 1973, is in the Appendix to the Petition, pages 53-55.

**Complaint for Declaratory Relief and Injunction Re:  
Federal Wholesome Meat Act of 1967.**



72- 604- 122 R

Jury demand date:

D. C. Form No. 104 Rev

TITLE OF CASE		ATTORNEYS			
THE RATH PACKING COMPANY, a corporation,		For plaintiff:			
Plaintiff,		Gibson, Dunn & Crutcher			
VS		Sherman Welpton, Jr.			
THE PEOPLE OF THE STATE OF CALIFORNIA: JOSEPH W. JONES as Director of the County of Riverside Department of Weights and Measures,		Dean C. Dunlavey			
Defendants.		515 South Flower St., Los Angeles, Calif., 90071 (213) 620-9300			
		For defendant:			
		Ray T. Sullivan, Jr., County Counsel			
		3535 Tenth St. Riverside, Ca 92501			
COMPLT FOR DECLARATORY RELIEF AND IN-JUNCTION RE: FEDERAL WHOLESOME MEAT ACT OF 1967					
STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DEPT.
J.S. 5 mailed	Clerk	2/1/72	401411	15	-
		2/1/72	32509	5	-
		2/5/72	32637	5	-
J.S. 6 mailed	Marshal				
Basis of Action:	Docket fee				
	Witness fees				
Action arose at:	Depositions				

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DATE	PROCEEDINGS	Date Order or Judgment Made
3/17/72	Fld complt for declaratory relief and injunction re: Federal Wholesome Meat Act of 1967. Ml JS-5. Issd sums.	
3/30/72	Fld Ord (R) (LTL) transig action to the calendar of Judge Lawrence T. Lydick for all fur prods. Nfld Pys.	
4/9/72	Fld retn of sums	
7/4/72	Fld prae for and issd alias sums. Fld request & Ord (RD) for service of process by other than UCN, naming Audrey Waite.	
12/18/72	Fld retn of alias sums.	
12/27/72	Fld Joseph W. Jones's ANSWER to complt.	
1/22/73	Fld note of PTC set for 3/19/73, 10am and mld cyps.	kh
3/5/73	CE ords final set 3/27/73, 9:30am & considtd w/72-607-3.	eam.
3/22/73	Fld pltf's note of mtn retnble 3/22/73, 9:30am and mld for sum judgment. Fld deft Joseph W. Jones's note of mtn retnble 3/22/73, 9:30am and mtn for sum judgment supporting memo and affid of John La Rose. Fld sd defts memo in support of mtn for sum judgment. Fld affid of John La Rose in support of defts mtn for sum judgment.	kh
3/26/73	Fld defts objections by Jones to Rath's errors.	kh
3/26/73	Fld pltf's stmt of genuine issues. Fld pltf's reply memo of pts and auth re mtns for sum judgment. Fld pltf's affid of Morris Y. Kinne.	kh kh
3/26/73	Counsel argue motions for summary judgment. Court orders both cases as to Becker & Jones Submitted.	rs
3/29/73	Fld deft's post hearing memo.	lab
6/30/73	Fld pltf's reply to Jones post hrg memo.	kh
7/2/73	Fld memo encl & ord that intervenor in case No. 72-607-3 & defts in case No. 72-608-3, together with their respective exhibits, etc. are permtly enjoined from applying the provisions of Calif. Business & Professions Code secto 12211 & or provors of Title 4, Calif. Admin Code, Chapter 2, subchapter 7, Article 5, to articles prepared & marked by pltf under U.S. Dept of Agriculture's inspection in accordance with the requirements of the federal Wholesome Meat Act, etc. The crt retains jurisd. (Ent 7/4/73) JS-5 mld cyps & mld prlys	
8/10/73	Fld defts note of mtn retnble 7/7/73, 9:30am to alter or amend court ord, mtn to alter or amend court ord and supporting memo.	kh
9/5/73	Filed Bill of Costs of 72-608-3, plaintiff J. W. JONES	
9/11/73	Costs in sum of 72-608-3, plaintiff J. W. JONES	
7/2/73	Fld pltf's stmt of reasons and memo of pts and auth in appos to Jones mtn to alter or amend court ord, applic to modify inj.	kh

DATE	PROCEEDINGS	Date Order or Judgment Made
5/1/73	Fld Deft's Request for Judicial Note.	an
5/4/73	Fld Deft's (Joseph W. Jones) Supplemental Memo in Support of Mtn to Alter or amend Crt ord & Affidavit of John Larose.	an
5/9/73	Fld Ord (R) That the Mtn of deft Joseph W. Jones entitled "Mtn to Alter or Amend Crt Ord" - is denied. Ent 5/9/73.	an
5/14/73	Fld deft Joseph W. Jones's NOTICE OF APPEAL, (w/service thereon) and designation of record on appeal, cyps to (R) and to (RE).	kh
5/15/73	Fld Pltf's The Rath Packing Co. Note of Application & Application for Modification to Injunction retnble 6/4/73 at 10am.	an
5/16/73	Fld pltf's cost bond on appeal in the sum of \$250.00 No. 8635561.	kh
5/17/73	Mtn deft to alter or amend Crt's ord 4/4/73 denied.	McD
5/25/73	Fld pltf's NOTICE OF APPEAL, (w/service thereon), cyps to (R) and to (RE). Fld pltf's costs bond on appeal in the sum of \$250.00.	kh
5/31/73	Fld Jones' opposition to Rath's application for modification of injunction. Fld Pltf's supplemental stmt of reasons & memo of pts & auths in support of application to modify injunction.	an
6/4/73	Hrg application for modification to injunction. Crt ords matter submitted (R).	McD
6/8/73	Fld deft not to extend time for transmitting records. LODGED proposed ord ext time to transmit record.	rif.
6-11-73	Fld ord (R) extending time to transmit record to 7-15-73	mr
6/15/73	Fld Ord (R) denying mtn for modification to the judgment of injunction.	an
7/20/73	Fld defts mtn to ext ti for transmitting record and ord (R) to and includg 8/12/73.	kh
9/7/73	Placed in file cost bond cost cross-appeal fld 5/25/73 - Seaboard Surety Co. 8765420	
9/7/73	Placed in file bond for costs on appeal fld 5/16/73 - Fidelity and Deposit Co. 88635561	
9/7/73	Placed in file cost bond on cross-appeal fld 5/25/73 - Seaboard Surety Co.	

BEST COPY AVAILABLE

I hereby certify that this is a true and correct copy of the original as filed in the court.

77 10

77 10

I hereby certify that this is a true and correct copy of the original as filed in the court.

Oct 25/77

LC No. #72-608

NY Judge Manual L. Real

Filed in D.C. 3/17/72

Notice of Appeal

Filed: 5/14/73

UNITED STATES COURT OF APPEALS  
FOR THE NINTH DISTRICT

73- 2496

CIVIL DC, CENTRAL CALIFORNIA		CONSOLIDATED
RATH PACKING COMPANY		<del>RELATED TO #73-2481 &amp; 73-2482 &amp;</del>
Pltf.-Appellee		CROSS-APPEAL TO # 73-3180
vs.		73-3092 & 73-2496
PEOPLE OF THE STATE OF CALIF.		For Appellant:
Defendant		DEAN C. DUNLAHEY, Esq.
JOSEPH W. JONES,		For Appellant:
Deft.-Appellant		RAY T. SULLIVAN, Jr., County Counsel LOYAL E. KEIR, Dep. Cnty. Counsel

DATE	APPELLANT'S ACCOUNT	BALANCE	RECEIVED	DISBURSED
1973				
UG 17	Deposit, R. 12 R.T. Sullivan (41179)	25-	25-	
UG 17	Treasurer U.S.			25-
NOV 9	Deposit, R. Clerk J. R.T. Sullivan (42237)	15-	15-	
NOV 9	Treasurer U.S.			15-
<div style="border: 1px solid black; padding: 5px; width: fit-content;"> A TRUE COPY ATTEST APR 27 1976 EAM C by: Winifred D. K. for </div>				
To Repro.	NOV 6 1973	From Repro.	NOV 18 1973	

73- 2496

DATE		SAME RECORD FOR #73-3180 FILING PROCEEDINGS	CLERK'S FEES	
1973			APPELLANT	APPELLEE
Aug 10	FILED, 8/10/73, ORIG. & THREE COPIES OF APPELLANT'S MOTION FOR EXTENSION OF TIME TO TRANSMIT & FILE RECORD ON APPEAL FROM 8/12/73 to 9/28/73 TO (C).	jjt	25.	
Aug. 10	DOCKET FEE PAID. DOCKETED CAUSE & ENTERED APPEARANCES OF COUNSEL.			
AUG 14	1973 FILED MOTION AND ORDER (C) EXTENDING TIME TO file the record on appeal to SEPTEMBER 28, 1973. Subject to reconsideration if any objection filed within 7 days. (fg)			
CT 5	1973 Recvd. orig. & 3 applt's motion for ext of time to transmit & file the record on appeal to C. (rg)			
OCT 8	1973 FILED MOTION AND ORDER (C) EXTENDING TIME TO file the record on appeal to OCTOBER 31, 1973. (ff)			
ct 9	Recvd orig & 3 affidavit of ct. reporter in support of motion for ext of time to file record. bb			
OCT 9	1973 Recvd. in 73-2481 appellee's opposition to motions for ext of time to transmit & file the record on appeal to C. (rg)			
ct 12	Filed in 73-2481 order (C) re appellee's opposition: Previous order will stand, etc. bb			
CT 30	FILED CERT TRANSC OF RECORD ON APPEAL IN TWO VOLUMES: VOL I PLEADINGS ORIG ONLY; VOL II REPORTER'S TRANSC ORIG & 1 COPY PURSUANT TO RULE 28(c) & (h) F.R.A.P. PLAINTIFF WILL BE DEEMED THE APPELLANT FOR PURPOSES OF FILING BRIEFS AND WILL FILE THE FIRST BRIEF UNLESS OTHERWISE STIPULATED Brief times will be set when the cross appeal has been docketed -ra-			
NOV 12	FILED TWO ADDITL COPIES OF VOL I Clerk's fee		\$15	(s)
Nov. 16	APPELLANTS BRIEF DUE DECEMBER 26, 1973. jjt			
Nov 28	Filed in 73-2481, orig & 3 copies appellee/cross-appellant's (Rath) motion to consolidate appeal with 73-2481, 73-2482, 73-3092 & 73-3180 and motion for extension of time to file appellant's opening brief; to "C" cs			
OCT 6	1973 FILED ORDER (C) in 73-2481 granting appellee's/cross applt's (RATH) leave to consolidate appeal with 73-2481, 73-2482, 73-3092, 73-2496 & 73-3180 and ext of time to file brief to JANUARY 28, 1974. "EFFECTIVE 7 DAYS FROM DATE IF NO OBJECTIONS FILED MEANWHILE."			
(SEE PAGE 2)				



DATE 1974	FILINGS-PROCEEDINGS	CLERK'S FEES	
		APPELLANT	APPELLEE
JAN 25 1974	FILED 25 APPELLANTS BRIEFS (RATH PACKING CO.) in 73-2481. ch		
FEB 7 1974	Filed orig. & 3 applt's/cross appellee's (JOSEPH W. JONES) motion for ext of time to file reply brief to C. (rg)		
FEB 11 1974	FILED ORDER (C) DENYING applt's/cross appellee's (JOSEPH W. JONES) motion for ext of time to file brief. "IN REAPPLYING COUNSEL SHOULD STATE ATTITUDE OF OPPONENT." (rg)		
Feb 19	Filed, in 73-2481, orig & 3 aples' (Becker & Christensen) motion for ext of time to file briefs; to "C" cs		
FEB 21 1974	Filed in 73-2481 applt's (JOSEPH W. JONES) motion for ext of time to file brief to C. (rg)		
FEB 25 1974	FILED ORDER (C) in 73-2481 extending time to file appellees' (BECKER & CHRISTENSEN) brief to MARCH 26, 1974. Subject to reconsideration if any objections filed within 7 days. (rg)		
FEB 27 1974	FILED ORDER (C) in 73-2481 extending time to file applt's (JOSEPH JONES) brief to MARCH 26, 1974. (rg)		
MAR 26 1974	FILED 25 APPELLANTS BRIEFS (for Joseph W. Jones) 3/25/74 qb		
Mar. 27	Filed in 73-2481, 25 APPELLEES/CROSS-APPELLANTS (Becker & Christensen) BRIEFS. (3/26/74) gh		
Apr 15	Filed in 73-2481 motion for ext of time to file cross applt's reply brief (RATH) (C) cl		
Apr 19	Filed in 73-2581 order (C) granting ext for cross-aplt/aple (Rath) to file reply brief to May 25, 1974, subject to reconsideration if any objection filed within 7 days. cl		
May 20	Filed in 73-2481 aple/cross-applt (Rath) motion for leave to file oversize brief (T). ty		
May 24	Filed, in 73-2481, order (T) granting cross aplt/aple (Rath) permission to file a reply brief in excess of 25 pages. jr		
May 24	Filed, in 73-2481, 25 aplt's reply breifs. (5/23/74) gb		
July 26	Filed, in 73-2481, aple/cross applt's (Rath) motion for priority in hearing date re oral argument to (C). jr		
SEE REVERSE SIDE			

DATE 1974	FILINGS-PROCEEDINGS	CLERK'S FEES	
		APPELLANT	APPELLEE
July 29	#73-3583 & #74-1051 for oral Filed aplt's (J. Jones) motion for consolidation of argument on appeal and to expedite oral argument to (C). jr		
July 31	Filed order (C) granting aplt (J. Jones) priority in hearing date re oral argument. Subject to reconsideration if any objection filed within 7 days. Clerk will try for an October, 1974 date. jr		
Aug 2	Recvd Atty Genl.'s letter joining in motion for priority hearing. cs		
Aug 5	Filed aple & aplt's (Rath) opposition to motion to consolidate for argument, etc. to (C). jr		
Aug 13	Filed aplt's (Jones) response to Rath's opposition to motion for consolidation of appeals. cs		
Aug 13	Rec'd, in 73-3583, as of August 12, 1974, amicus curiae counsel's letter requesting that motion for consolidation be granted. (C) jr		
Aug 19	Filed order (C) my previous orders for consolidation will not apply to the General Mills case. jr		
Aug 19	Filed order (C) directing clerk to attempt a November, 1974 date. jr		
Aug 19	Cause argued & submitted to Br, T, CJJ, Rich.		
Dec 23	Rec'd aplts additional citations to (panel). jr		
Dec 26	Rec'd Deputy Attorney General's letter in response to appellants additional citations to panel (sj)		
Dec 27	Rec'd (Rath Packing Co) letter dated Dec 23 re additional citations to panel (sj)		
Jan 3 1975	Rec'd Deputy Attorney General's letter of additional citations to (panel). jr		
March 12	Rec'd Aplt./Cross-Aple (Deputy Counsel) letter of add'tl citations. (to panel) -acb-		
Mar 19	Received Defendant's County Counsel letter of March 17, 1975 supported with USDC of So. Dist of NY opinion dated Feb 25, 1974. (passed to panel) sj		
SEE THIRD SHEET			



DATE 1973	SAME RECORD FOR #73-2496 FILINGS-PROCEEDINGS	CLERK'S FEES	
		APPELLANT	APPELLEE
	FILED OCT.30,1973 IN #73-2496, CERT TRANSC. OF RECORD ON APPEAL IN TWO VOLUMES: VOL. I, PLEADINGS, ORIG. ONLY: VOL. II, REPTA'S TRANSC., ORIG. & ONE COPY.		
Nov.15	DOCKET FEE PAID, CAUSE DOCKETED & ENTERED APPEARANCES OF COUNSEL.	50.	
Nov.16	APPELLANTS BRIEF DUE DECEMBER 26,1973. jjt Purs. to Rule 28 (c) & (h), FRAP Pltf. will be deemed the appellant for purposes of filing of briefs & will file the opening brief unless otherwise stipulated.		
Nov 28	Filed in 73-2481, orig & 3 copies appellee/cross-appellant's (Rath) motion to consolidate appeal with 73-2481, 73-2482, 73-3092, & 73-2496 and motion for extension of time to file appellant's opening brief; to "C" cs		
DEC 6	1973 FILED ORDER (C) in 73-2481 granting appellee's leave to consolidate appeal with 73-2481, 73-2482, 73-3092, 73-2496 & 73-3180 and ext of time to file brief to JANUARY 28, 1974. "EFFECTIVE 7 DAYS FROM DATE IF NO OBJECTION FILED MEANWHILE." (rg)		
JAN 25	1974 FILED 26 APPELLANTS BRIEFS (RATH PACKING CO. in 73-2481. th		
FEB 7	1974 Filed in 73-2496 applt's/cross appellee's (JOSEPH W. JONES) motion for ext of time to file reply brief to C. (rg)		
FEB 13	1974 FILED ORDER (C) in 73-2496 denying applt's/cross appellee's (JOSEPH W. JONES) motion for ext of time to file brief. "IN REAPPLYING COUNSEL SHOULD STATE ATTITUDE OF OPPONENT." (rg)		
Feb 19	Filed, in 73-2481, orig & 3 aples' (Becker & Christensen) motion for ext of time to file brief; to "C" cs		
FEB 21	1974 Filed in 73-2481 applt's (JOSEPH W. JONES) motion for ext of time to file brief to C. (rg)		
FEB 23	1974 FILED ORDER (C) in 73-2481 extending time to file appellees' (BECKER & CHRISTENSEN) brief to MARCH 26, 1974. Subject to reconsideration if any objections filed within 7 days. (rg)		
FEB 27	1974 FILED ORDER (C) in 73-2481 extending time to file applt's (JOSEPH JONES) brief to MARCH 26, 1974. (rg)		
Mar.26	Filed in 73-2496, 25 APPELLANTS BRIEFS. (for Joseph W. Jones) 3/25/74 gb		
Mar.27	Filed in 73-2481, 25 APPELLEES/CROSS-APPELLANTS (Becker & Christensen) BRIEFS. (3/26/74) gb See Page 2.		

DATE	FILINGS-PROCEEDINGS	CLERK'S F	
		APPELLANT	APPELLEE
Apr 15	Filed in 73-2481 motion for ext of time to file cross applt's reply brief (RATH) (C) cl		
Apr 19	Filed in 73-2481 order (C) granting ext for cross-applt/aple (Rath) to file reply brief to May 25, 1974, subject to reconsideration if any objection filed within 7 days. cl		
May 20	Filed in 73-2481 aple/cross-applt (Rath) motion for leave to file oversize brief (T). TY		
May 24	Filed, in 73-2481, order (T) granting cross applt/aple (Rath) permission to file a reply brief in excess of 25 pages. jr		
May 24	Filed, in 73-2481, 25 applt's reply breifs. (5/23/74) gb		
July 26	Filed, in 73-2481, aple/cross applt's (Rath) motion for priority in hearing date re oral argument to (C). jr		
July 29	Filed, in 73-2496, applt's (J.Jones) motion for consolidation of #73-2583 & #74-1051 for oral argument on appeal and to expedite oral argument to (C). jr		
July 31	Filed, in 73-2481, order (C) granting applt (J.Jones) priority in hearing date re oral argument. Subject to reconsideration if any objection filed within 7 days. Clerk will try for an October, 1974 date. jr		
Aug 2	Rec'd, in 73-2481, Atty General's letter joining in motion for priority hearing. cs		
Aug 5	Filed, in 73-2481, aple & applt's (Rath) opposition to motion to consolidate for argument, etc. to (C). jr		
Aug 13	Filed, 73-2481, applt's (Jones) response to Rath's opposition to motion for consolidation of appeals. cs		
Aug 13	Rec'd, in 73-3583, as of August 12, 1974, amicus curiae counsel's letter requesting that motion for consolidation be granted. (C) jr		
Aug 19	Filed, in 73-2496, order (C) my previous orders for consolidation will not apply to the General Mills case. jr		
Aug 19	Filed, in 73-2481, order (C) directing clerk to attempt a November, 1974 date. jr		
DEC 3	1974 Cause argued & submitted to Br. T. CJJ, Rich.		
	SEE REVERSE SIDE		

CALENDAR  
12/1/74



73-3180

DATE	FILINGS PROCEEDINGS	CLERK'S FILES	
		APPELLANT	APPELLEE
1975			
March 17	Rec'd additional citations from Appt./Cross-Appl (Deputy County Counsel) (to panel) -acb-		
Mar 19	Received Defendant's County Counsel letter of March 17, 1975 supported with USDC of So. Dist of NY opinion dated Feb 25, 1974 (passed to panel) sj		
Oct. 29	ORDERED OPINION (RICH) FILED & JUDGE TO BE FILED & ENTD		
Oct. 29	Filed opinion - Affirmed in part, reversed in part & remanded		
Oct. 29	Filed & Entered Judgment. jr 55-34		
Nov 7	Filed in 73-2482, Bill of Cost (Rath Packing) ec		
JAN 14 1976	ISSUED JUDGMENT]		
Feb 4	Recvd. SC notice re: filing pet for cert 1/26/76 SC#75-1053		
Mar 2	Filed in 73-2481, Petitioners' emergency motion for recall of mandate. (p)		
Mar 10	Filed, in 73-2481, order (Br, T & Rich) the motion for recall of mandate is denied. jr		
Feb. 9	Received notice from Supreme Court that petition for certiorari has been filed. Assigned No. 75-1052. wdt		
Apr. 26	Filed certified copy of Supreme Court order granting certiorari on April 19, 1976. To panel. wdt		

Case No. #72-607  
 D.C. Judge Manuel L. Real  
 Filed in D.C. 3/17/72  
 Notice of Appeal  
 Dated: 5/4/73

UNITED STATES COURT OF APPEALS  
 FOR THE NINTH DISTRICT

73-2481

CIVIL, DC, CENTRAL CALIFORNIA	CONSOLIDATED
	COMPARISON TO #73-2482 - RELATED TO #73-2496 & CROSS-Appel to #73-3092 & 73-3180
RATH PACKING COMPANY,	For Appellant:
Pltf.-Appellee	DEAN C. DUNLAVEY, Esq.
vs.	
M. H. BECKER,	For Appellant:
Def.-Appellant	JOHN LARSON, Esq. Cnty. Counsel
C. B. CHRISTENSEN	ARNOLD K. GRAHAM, Esq., Dep. Cnty Counsel
Intervenor	

DATE	APPELLANT'S ACCOUNT	BALANCE	RECEIVED	DISBURSED
17	Deposit, R. 12 (4/2/76) (41121)	25-	25-	
	Treasurer U.S.			25-
2	Deposit, R. Check 2 (4/2/76) (42196)	15-	15-	
	Treasurer U.S.			15-
<div style="border: 1px solid black; padding: 5px; width: fit-content; margin: 10px auto;"> <p>A TRUE COPY            ATTEST MAY 10 1976            EMIL E. MELFI, JR.            Clerk of Court            by: Winifred D. Taylor            Winifred D. Taylor            Chief Deputy Clerk</p> </div>				
NOV 5 1973	From Repro.	NOV 8 1973		

73-2481

DATE 1973	SAME RECORD FOR #73-2481 & 73-2482 FILINGS PROCEEDINGS	CLERK'S FEES	
		APPELLANT	APPELLEE
	8/3/73 FILED, MOT. & ORDER (C) TO EXTEND APPELLANT'S TIME TO TRANSMIT AND FILE THE RECORD & DOCKET APPEAL FROM 8/2/73 TO 9/28/73. DOCKET FEE PAID. DOCKETED CAUSE & ENTERED APPEARANCES OF COUNSEL. jje	25.	
Aug. 8			
OCT 4 '73	Recvd. orig. & 3 applt/intervenor motion for further ext of time to file the record to C. (ff)		
OCT 8 '73	FILED MOTION AND ORDER (C) EXTENDING TIME TO file the record on appeal to OCTOBER 31, 1973...for 73-2481 & 73-2482. (ff)		
OCT 8 '73	Recvd. orig. & 8 appellee's motion in opposition to motions for ext of time to transmit the record on appeal to C. (rg)		
OCT 12	Filed order (C) re appellee's opposition: Previous order will stand, etc. bb		
OCT 23	FILED CERT TRANSC OF RECORD ON APPEAL IN SEVEN VOLUMES: VOL I THRU IV PLEADINGS ORIG ONLY; VOL V THRU VII REPORTER'S TRANSC ORIG & 1 COPY. FILED ORIG EXHIBITS IN ROOM 219***** -ra-		
	PURSUANT TO RULE 28(c) & (h) F.R.A.P. PLAINTIFF WILL BE DEEMED THE APPELLANT FOR PURPOSES OF FILING BRIEFS AND WILL FILE THE FIRST BRIEF UNLESS OTHERWISE STIPULATED. Brief times will be set when the cross appeal has been docketed -ra-		
OCT 31	Appellant's Brief Due December 10, 1973 -ra-		
OCT 31	Recvd letter from Atty General's office re: motion for extension of time to file record. ty		
NOV 8	FILED TWO ADDITL COPIES OF VOLS 1 - 4 Clerk's fee \$15 (s)		
NOV 28	Filed orig & 3 copies appellee/cross-appellant's (Rath) motion to consolidate appeal with 73-2482, 73-3092, 73-2496 & 73-3180 and extension of time to file appellant's opening brief; to "C" cs		
DEC 1 '73	FILED ORDER (C) granting appellee's/cross applt's (RATH) leave to consolidate appeal with 73-2482, 73-3092, 73-2496 & 73-3180, and the ext of time to file brief to JANUARY 28, 1974. "EFFECTIVE 7 DAYS FROM DATE IF NO OBJECTIONS FILED MEANWHILE." (rg)		
1974	FILED 25 APPELLANTS REPLY BRIEFS (RATH PACKING CO.) th		
	(SEE PAGE 2)		

73-2481

(page 2)

DATE 1974	FILINGS PROCEEDINGS	CLERK'S FEES	
		APPELLANT	APPELLEE
FEB 7 '74	Filed in 73-2496 applt's /cross appellee's motion for ext of time to file reply brief to C. (rg)		
FEB 11 '74	FILED ORDER (C) in 73-2497 denying applt's/cross appellee's (JOSEPH W. JONES) motion for ext of time to file brief. "IN REAPPLYING COUNSEL SHOULD STATE ATTITUDE OF OPPONENT." (rg)		
Feb 19	Filed orig & 3 aples' (Beckler & Christensen) motion for ext of time to file briefs; to "C" cs		
FEB 21 '74	Filed orig. & 3 applt's (JOSEPH W. JONES) motion for ext of time to file brief to C. (rg)		
FEB 26 '74	FILED ORDER (C) EXTENDING TIME TO FILE appellees' (BECKLER & CHRISTENSEN) brief to MARCH 26, 1974. Subject to reconsideration if any objections filed within 7 days. (rg)		
FEB 27 '74	FILED ORDER (C) EXTENDING TIME TO FILE applt's (JOSEPH JONES) brief to MARCH 26, 1974. (rg)		
Mar. 27	Filed 25 APPELLEES/CROSS-APPELLANTS (Beckler & Christensen) BRIEFS.		
Apr 15	Filed motion for ext of time to file cross (3/27/74) ch Aplt's reply brief (RATH) (C) (sp)		
Apr 19	Filed order (C) granting ext for cross-aplt/aple (Rath) to file reply brief to May 25, 1974, subject to reconsideration if any objection filed within 7 days. cl		
May 20	Filed aple/cross-applt (Rath) motion for leave to file oversize brief (T). ty		
May 24	Rec'd. 25 Reply Briefs for Aplt. (Rath Packing Co.). -cr-		
May 24	Filed order (T) granting cross aplt/aple (Rath) permission to file a reply brief in excess of 25 pages. jr		
MAY 24 1974	FILED 25 APPELLANTS REPLY BRIEFS (5/21/74) ja		
July 26	Filed aple/cross applt's (Rath) motion for priority in hearing date re oral argument to (C). jr		
DEC 5 1974	Cause argued & submitted to BY, T. COJ, RICH. FOR FURTHER PROCEEDINGS SEE #73-2496		
1975			
Oct. 29	ORDERED OPINION (RICH) FILED & JUDGE TO BE FILED & ENTD		
Oct. 29	Filed opinion - Affirmed in part, reversed in part & remanded		
Oct. 29	Filed & Entered Judgment. jr 65-39		
JAN 14 1976	ISSUED JUDGMENT		

CALENDARED  
10-10-75

[illegible]

DATE	APPELLANT'S ACCOUNT	BALANCE	RECEIVED	DISBURSED
17	Deposit, R. 12 Treasurer H of Co. (41172)	25 -	25 -	
17	Treasurer U.S.	0		25 -

A TRUE COPY  
 ATTEST MAY 10 1973  
 EMIL E. NIELS  
 Clerk of Court  
 By: Winifred D. Taylor  
 Winifred D. Taylor  
 Chief Deputy Clerk

NOV 5 1973

NOV 6 1973

**BEST COPY AVAILABLE**



73- 2482

DATE 1973	SAME RECORD FOR #73-2481 & 73-2482 FILINGS PROCEEDINGS	CLERK'S FEES	
		APPELLANT	APPELLEE
	FILED 8/8/73 IN #73-2481, MOT. & ORDER (C) TO EXTEND APPELLANTS TIME TO TRANSMIT & FILE THE RECORD & DOCKET APPEAL FROM 8/2/73 TO 9/28/73. jjt		
Aug 8	DOCKET FEE PAID. DOCKETED CAUSE & ENTERED APPEARANCES OF COUNSEL. jjt	25.	
OCT 4	73 Recvd in 73-2481 applt/intervenor motion for ext of time to C. (ff)		
OCT 8	FILED MOTION AND ORDER (C) EXTENDING TIME TO file the record on appeal to OCTOBER 31, 1973 filed in 73-2481. (ff)		
OCT 9	1973 Recvd. in 73-2481 appellee's opposition to motion for ext of time to transmit & file the record on appeal to C. (rg)		
Oct 12	Filed in 73-2481 order (C) re appellee's opposition: Previous order will stand, etc. bb		
OCT 23	FILED IN 73-2481 CERT TRANS OF RECORD ON APPEAL IN SEVEN VOLUMES: VOL I THRU IV PLEADINGS ORIG ONLY; VOL V THRU VII REPORTER'S TRANS ORIG & 1 COPY. FILED ORIG EXHIBITS IN ROOM 219***** -ra-		
	PURSUANT TO RULE 28(e) & (h) P.R.A.P. PLAINTIFF WILL BE DEEMED THE APPELLANT FOR PURPOSES OF FILING BRIEFS AND WILL FILE THE FIRST BRIEF UNLESS OTHERWISE STIPULATED. Brief times will be set when the cross appeal has been docketed -ra-		
OCT 31	Appellant's Brief Due December 10, 1973 -ra-		
Oct 31	Recvd letter from office of Atty Gen. re: motion for extension of time to file record. ty		
NOV 8	FILED IN # 73-2481, TWO ADDITL COPIES OF VOLS 1 - 4 (s)		
Nov 26	Filed in 73-2481, orig & 3 copies appellee/cross-appellant's (Rath) motion to consolidate appeal with 73-2481, 73-3092, 73-2496 & 73-3180 and motion for extension of time to file appellant's opening brief; to "C" cs		
	FILED ORDER (C) in 73-2481 granting appellee's/cross applt's (RATH) leave to consolidate appeal with 73-2481, 73-2482, 73-3092, 73-2496 & 73-3180 and the ext of time to file brief to JANUARY 28, 1974. "EFFECTIVE DAYS FROM DATE IF NO OBJECTIONS FILED MEANWHILE." (rg)		
	(SEE PAGE 2)		

73-2482

(PAGE 2)

DATE 1974	FILINGS PROCEEDINGS	CLERK'S FEES	
		APPELLANT	APPELLEE
JAN 25 1974	FILED 25 APPELLANTS BRIEF (RATH PACKING CO.) in 73-2481. th		
FEB 7 1974	Filed in 73-2496 applt's/cross appellee's (JOSEPH W. JONES) motion for ext of time to file reply brief to C. (rg)		
FEB 11 1974	FILED ORDER (C) in 73-2496 applt's/cross appellee's (JOSEPH W. JONES) denying motion for ext of time to file brief. "IN REAPPLYING COUNSEL SHOULD STATE ATTITUDE OF OPPONENT." (rg)		
Feb 19	Filed, in 73-2481, orig & 3 aples' (Becker & Christensen) motion for ext of time to file briefs; to "C" cs		
FEB 21 1974	Filed in 73-2481 applt's (JOSEPH W. JONES) motion for ext of time to file brief to C. (rg)		
FEB 26 1974	FILED ORDER (C) in 73-2481 extending time to file appellees' (BECKER & CHRISTENSEN) brief to MARCH 26, 1974. Subject to reconsideration if any objections filed within 7 days. (rg)		
FEB 27 1974	FILED ORDER (C) in 73-2481 extending time to file applt's (JOSEPH JONES) brief to MARCH 26, 1974. (rg)		
Mar 27	Filed in 73-2481, 25 APPELLEES/CROSS-APPELLANTS (Becker & Christensen) BRIEFS. (3/26/74) gb		
Apr 15	Filed in 73-2481 motion for ext of time to file cross Applt's reply brief (RATH) (C) cl		
Apr 19	Filed in 73-2481 order (C) granting ext for cross-applt/aple (Rath) to file reply brief to May 25, 1974 subject to reconsideration if any objection filed within 7 days. cl		
May 20	Filed in 73-2481 aple/cross-applt (Rath) motion for leave to file oversize brief (T) . ty		
May 24	Filed, in 73-2481, order (T) granting cross applt/aple (Rath) permission to file a reply brief in excess of 25 pages. jr		
May 24	Filed, in 73-2481, 25 applt's reply briefs. (5/23/74) gb		
July 26	Filed, in 73-2481, aple/cross applt's (Rath) motion for priority in hearing date re oral argument to (C). jr		
	Cause argued & submitted to Br, T, CJJ, Rich. CALENDARED 12/15/74		
	FOR FURTHER PROCEEDINGS SEE #73-2496		
	SEE REVERSE SIDE		

DATE		FILINGS PROCEEDINGS	CLERK'S FEES	
			APPELLANT	APPELLATE
1975				
Oct 29	ORDERED OPINION (Rich) FILED & JUDG TO BE FILED & ENTD			
Oct 29	Filed opinion - Affirmed in part, reversed in part & remanded			
Oct 29	Filed & Entered Judgment. jr			
Nov 7	Filed Bill of Cost (Rath Packing) ec (panel)			
JAN 14 1976	ISSUED JUDGMENT			
Feb. 4	Recvd. S.C. notice re: filing pet for cert 1726/76 SC#75-1053			
Mar 2	Filed in 73-2481, Petitioners emergency motion for recall of mandate. (panel)			
Mar 12	Filed order (Br, T & Rich) the motion for recall of mandate is denied. jr			
Mar 17	Filed Opposition (Rath Packing) to "EMERGENCY MOTION" for recall of mandate, etc.	ec		

DATE 1973	APPELLANT'S ACCOUNT	BALANCE	RECEIVED	DISBURSED
NOV 9	Deposit, R. 12 \$ 80.00 (42166)	25-	25-	
NOV 9	Treasurer U.S.	0-		25-

A TRUE COPY  
 ATTEST MAY 19 1976  
 EMIL E. MELFI, JR.  
 Clerk of Court  
 by: Winifred D. Taylor  
 Winifred D. Taylor  
 Chief Deputy Clerk

Repro. NOV 5 1973

NOV 8 1973

Repro. Repro.

73-3092

DATE	FILINGS PROCEEDINGS	CLERK'S FEES	
		APPELLANT	APPELLEE
	SAME RECORD FOR 73-2481 & 73-2482		
	FILED 8/8/73 MOT & ORDER (C) TO EXTEND APPELLANT'S TIME TO TRANSMIT AND FILE THE RECORD & DOCKET APPEAL FROM 8/2/73 to 9/28/73		
	FILED 10/8/73 MOTION AND ORDER (C) EXTENDING TIME TO file the record on appeal to OCTOBER 31, 1973...for 73-2481 & 73-2482 FILED OCT 23, 1973 IN 73-2481 CERT TRANSC OF RECORD ON APPEAL IN SEVEN VOLUMES, VOL I THRU IV PLEADINGS ORIG ONLY; VOL V THRU VII REPORTER'S TRANSC ORIG & 1 COPY. FILED ORIG EXHIBITS IN 219*****		
OCT 31	DOCKET FEE PAID-- DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL	\$25	
	PURSUANT TO RULE 28(c) & (h) F.R.A.P. PLAINTIFF WILL BE DEEMED THE APPELLANT FOR PURPOSES OF FILING BRIEFS AND WILL FILE THE FIRST BRIEF UNLESS OTHERWISE STIPULATED. Brief times will be set when the cross appeal has been docketed		
OT 31	Appellant's Brief Due December 10, 1973 -ra-		
NOV 8	FILED IN # 73-2481, TWO ADDITL COPIES OF VOLS 1 - 4 (s)		
Nov 28	Filed in 73-2481, orig & 3 copies appellee/cross-appellant's (Rath) motion to consolidate appeal with 73-2481, 73-2482, 73-2496 & 73-3092 and motion for extension of time to file appellant's opening brief; to "C" cs		
DEC 6 1973	FILED ORDER (C) in 73-2481 granting appellee's/cross applt's (RATH) lea to consolidate appeal with 73-2481, 73-2482, 73-3092 & 73-2496 & 73-3180 and the ext of time to file brief to JANUARY 28, 1974. "EFFECTIVE 7 DAYS FROM DATE IF NO OBJECTIONS FILED MEANWHILE." (rg)		
JAN 21	FILED IN 73-2481, APPELLANT'S BRIEF (RATH PACKING CO.) in 73-2481. th		
FEB 7	Filed in 73-2496 applt's/cross appellee's (JOSEPH W. JONES) motion for ext of time to file reply brief to C. (rg)		
FEB 11 1974	FILED ORDER (C) in 73-2496 denying applt's/cross appellee's (JOSEPH W. JONES) motion for ext of time to file brief. "IN REAPPLYING COUNSEL SHOULD STATE ATTITUDE OF OPPONENT." (rg)		
Feb 19	Filed, in 73-2481, orig & 3 aples' (Becker & Christensen) motion for ext of time to file briefs; to "C" cs		
	Filed in 73-2481 applt's (JOSEPH W. JONES) motion for ext of time to file brief to C. (rg)		
	*****SEE SECOND PAGE*****		

\*\*\*\*\*SECOND PAGE OF 73-3092\*\*\*\*\*

DATE	FILINGS PROCEEDINGS	CLERK'S F	
		APPELLANT	APPELLEE
1974			
Feb 1 1974	FILED ORDER (C) in 73-2481 extending time to file appellees' (BECKER & CHRISTENSEN) brief to MARCH 26, 1974. Subject to reconsideration if any objections filed within 7 days. (rg)		
FEB 27 1974	FILED ORDER (C) in 73-2481 extending time to file (JOSEPH JONES) brief to MARCH 26, 1974. (rg)		
Mar. 27	Filed in 73-2481, 25 APPELLES/CROSS-APPELLANTS (Becker & Christensen) BRIEFS. (3/26/74) gb		
Apr 15	Filed in 73-2481 motion for ext of time to file cross applt's reply brief (RATH) (C) cl		
Apr 19	Filed in 73-2481 order (C) granting ext for cross-aplt/aple (Rath) to file reply brief to May 25, 1974, subject to reconsideration if any objection filed within 7 days. cl		
May 20	Filed in 73-2481 aple/cross-applt (Rath) motion for leave to file oversize brief (T). ty		
May 24	Filed, in 73-2481, order (T) granting cross aplt/aple (Rath) permission to file a reply brief in excess of 25 pages. jr		
May 24	Filed, in 73-2481, 25 aplt's reply breifs. (5/23/74) gb		
July 26	Filed, in 73-2481, aple/cross applt's (Rath) motion for priority in hearing date re oral argument to (C). jr		
AUG 5 1974	Case argued & submitted to Br. T, CJS, Rich. FOR FURTHER PROCEEDINGS SEE #73-2496		
1975			
Oct 29	ORDERED OPINION (RICH) FILED & JUDG TO BE FILED & ENTD		
Oct 29	Filed opinion - Affirmed in part, reversed in part & remanded		
Oct 29	Filed & Entered Judgment. jr 65-34		
Nov 7	Filed in 73-2482, Bill of Cost (Rath Packing) ec		
JAN 14 1975	ISSUED JUDGMENT		
Feb. 4	Recvd. SC notice re: filing pet for cert 1/26/76 SC#75-1053		
Mar 2	Filed in 73-2481, Petitioners' emergency motion for recall of mandate. (panel) ec		
Mar 12	Filed, in 73-2481, order (Br, T & Rich) the motion for recall of mandate is denied. jr		



**Joseph W. Jones v. The Rath Packing Co.**

**Complaint for Declaratory Relief and Injunction.**

United States District Court, Central District of California.

The Rath Packing Company, a corporation, Plaintiff, vs. The People of the State of California; Joseph W. Jones as Director of the County of Riverside Department of Weights and Measures, Defendants. Civil Action No. 72-608-LTL.

As and for its complaint herein, plaintiff The Rath Packing Company alleges as follows:

1. Plaintiff The Rath Packing Company ("Rath") is a corporation organized and existing under the laws of the State of Iowa, having its principal place of business in Waterloo, Iowa.

2. Defendant Joseph W. Jones ("Jones") is Director of the County of Riverside Department of Weights and Measures and is a California citizen.

3. This action is instituted and arises under 21 U.S.C. § 601, *et seq.* (the Federal Wholesome Meat Act of 1967). Furthermore, this action is between citizens of different states. The matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs. Jurisdiction of this Court is based on 28 U.S.C. §§ 1331(a) and 1332(a) and on 21 U.S.C. § 674; venue is based on 28 U.S.C. § 1391. This also is a civil action for a judgment declaring the rights and other legal relations of the parties hereto, pursuant to 28 U.S.C. §§ 2201 and 2202, in respect to an actual controversy between them which is within the jurisdiction of this Court.

4. Rath is a manufacturer of meat food products as defined in 21 U.S.C. § 601(j), is engaged in inter-

state commerce, is registered with the Secretary of Agriculture of the United States as required by 21 U.S.C. § 601, *et seq.*, and is inspected at all times by the United States Department of Agriculture.

5. The labeling of all bacon and other meat food products packaged and sold by Rath, including without limitation an accurate statement of the quantity of the contents thereof in terms of weight, is performed by Rath in accordance with the regulations and requirements of the United States Department of Agriculture—i.e., under 21 U.S.C. §§ 601(n)(1) and (5), 607; under Title 9, Code of Federal Regulations, Part 317; and under the Manual of Meat Inspection Procedures of the United States Department of Agriculture.

6. Pursuant to the foregoing regulations and requirements, Rath is required to mark on the label of each meat food product package an accurate statement of the quantity of contents of such meat food product package in terms of weight, exclusive of wrappers and packing substances, at the time such meat food product package leaves Rath's plant. At all times mentioned in this complaint, Rath has complied fully with said regulations and requirements.

7. 21 U.S.C. § 678 provides that marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under the Federal Wholesome Meat Act of 1967 may not be imposed by the State of California with respect to articles prepared by Rath under United States Department of Agriculture inspection in accordance with said Act. All meat food products packaged by Rath at issue herein have been and are prepared by Rath under such inspection in accordance with said Act.

8. Each defendant now contends to have the right to impose, and has imposed and is imposing, requirements upon the marking, labeling and packaging of such packages of meat food products prepared by Rath which are in addition to, and different from, the requirements of the United States Department of Agriculture. In particular, The People of the State of California contend that certain California statutes (*viz.* Health and Safety Code § 26550; Business and Professions Code § 17500; Civil Code § 3369) impose requirements upon the marking, labeling and packaging of such meat food products prepared by Rath; that said statutes are being violated by Rath; and that any district attorney in this state may maintain actions based thereon against Rath in superior courts of this state. In further particular, defendant Jones now contends to have the right to impose, and has imposed and is imposing, a requirement that the statement on each such package of meat food product of the quantity of contents of such meat food product package in terms of weight be accurate at a time after such meat food product leaves Rath's plant; namely, in the possession of dealers. Neither defendant recognizes reasonable variation from the stated quantity of contents caused by loss of moisture during the course of good distribution practices or by unavoidable deviations in good manufacturing practice, each of which is specifically recognized and allowed by the United States Department of Agriculture under 21 U.S.C. § 601(n)(5) and Title 9, C.F.R. § 317.2(h)(2).

9. Rath denies each contention of each defendant as set forth in Paragraph 8; contends that neither defendant may impose marking, labeling, packaging, or ingredient requirements with respect to such packages

of meat food products in addition to, or different than, those made under the Federal Wholesome Meat Act of 1967; and contends that neither defendant has the right to impose the requirement with respect to such packages of meat food products that the statement on any such package of meat food product of the quantity of contents of such meat food product package in terms of weight be accurate at a time after such meat food product leaves Rath's plant; namely, in the possession of dealers.

10. An actual controversy now exists between each defendant and Rath with respect to the legal relations of the parties and the rights of Rath under the Federal Wholesome Meat Act of 1967. The value to Rath of its right to be free of the aforesaid requirements by each defendant in addition to, and different from, said Act exceeds the sum of \$10,000, exclusive of interest and costs.

#### SECOND CAUSE OF ACTION

11. Rath incorporates herein, with the same force and effect as if set forth in full, the allegations of Paragraphs 1 through 10, inclusive.

12. Pursuant solely to defendant Jones' aforesaid contentions and requirements, and by acting through his deputies and inspectors, defendant Jones has ordered and is ordering "off sale" meat food products prepared, packaged, labeled, and sold by Rath under United States Department of Agriculture inspection in accordance with the Federal Wholesome Meat Act of 1967, and otherwise has prevented and is preventing the sale by Rath and by dealers of such meat food products. In so doing, defendant Jones is acting unlawfully and beyond the scope of his authority, is applying

California law to conduct not within its terms, and is violating the Federal Wholesome Meat Act of 1967.

13. By his said unlawful acts, defendant Jones has caused Rath monetary damages grossly in excess of \$10,000, as well as irreparable injury to its reputation among dealers and the consuming public. Defendant Jones is continuing and threatening to continue his said acts, and will cause Rath further monetary damages and further immediate and irreparable injury, unless and until restrained by this Court. Pecuniary compensation to Rath will not afford adequate relief for such acts.

WHEREFORE, Rath prays judgment as hereinafter set forth:

1. For a declaration that the legal relations of the parties and the rights of Rath are in accordance with the contentions of Rath as set forth in Paragraph 9 above;

2. That defendant Jones, and his deputies, inspectors, officers, agents, servants, employees, attorneys and other persons in active concert or participation with him, be restrained and enjoined both pending the trial of this action and thereafter:

(a) from imposing marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under the Wholesome Meat Act of 1967 with respect to articles prepared by Rath under United States Department of Agriculture inspection in accordance with the requirements under said Act; and

(b) from ordering "off sale", or otherwise preventing the sale of, any package of meat food products prepared by Rath under United States



Department of Agriculture inspection in accordance with the Wholesome Meat Act of 1967 on grounds that the statement on such package of meat food product of the quantity of contents of such meat food product package in terms of weight is not accurate at a time after such meat food product has left Rath's plant;

3. For costs of suit incurred by Rath; and
4. For such other and further relief which the Court may deem just and proper.

GIBSON, DUNN & CRUTCHER  
SHERMAN WELPTON, JR.  
DEAN C. DUNLAVEY

/s/ By Dean C. Dunlavey  
Dean C. Dunlavey  
Attorneys for Plaintiff  
The Rath Packing Company

# VERIFICATION

State of California, County of Los Angeles—ss:

MORRIS Y. KINNE, being first duly sworn according to law, verifies and says:

I am Secretary of The Rath Packing Company; the attached Complaint is true of my own knowledge.

/s/ Morris Y. Kinne  
Morris Y. Kinne

Subscribed and sworn to before me this 17th day of March, 1972.

/s/ Maria T. Sequeira  
Notary Public

[Seal]

**Answer to Complaint.\***

United States District Court, Central District of California.

The Rath Packing Company, a Corporation, Plaintiff, vs. The People of the State of California; Joseph W. Jones as Director of the County of Riverside Department of Weights and Measures, Defendants. Civil Action. No. 72-608-R.

Defendant JONES, for his answer to the Complaint herein, alleges as follows:

1. Admits the allegations of Paragraph 1.
2. Admits the allegations of Paragraph 2.
3. Denies upon information and belief each and every allegation contained in Paragraph 3, and therefore denies, upon information and belief, that this court has any jurisdiction.
- By reason of the aforesaid denial, defendant denies that plaintiffs are legally entitled to seek either a declaration of their rights or an injunction of defendant, or any other relief sought in the Complaint.
4. Admits that Rath is a manufacturer of meat food products and that it is registered with the Secretary of Agriculture of the United States, but denies upon information and belief each and every other allegation in Paragraph 4.

5. Denies upon information and belief each and every allegation in Paragraph 5.

6. Admits that the contents of a meat food product package are required by Federal regulations to be labeled with a statement of the quantity of contents, but

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\* Certificate of service by mail is omitted.

defendant denies upon information and belief that said labeling regulations are applicable only to the time such meat food product package leaves the manufacturing plant. Defendant further denies upon information and belief that plaintiff has fully complied with said regulations as alleged in Paragraph 6 of the Complaint.

7. Denies upon information and belief each and every allegation set forth in Paragraph 7.

8. Admits that certain California statutes impose labeling requirements for packaged food products, and further admits that defendant has enforced California statutory requirements that meat food product packages be generally accurate in terms of weight at the consumer level, but otherwise denies the allegations of Paragraph 8.

9. Denies each and every allegation stated in Paragraph 9.

10. Denies on information and belief each and every allegation stated in Paragraph 10.

**SECOND CAUSE OF ACTION**

11. Defendant incorporates herein, with reference to Paragraph 11 of the Complaint, with the same force and effect as if set forth in full, its answers above in Paragraphs 1 through 10, inclusive.

12. Admits that Defendant JONES has ordered off sale packages of bacon packed by Rath when such packages were misbranded as to weight and were outside the establishment, but otherwise denies the allegations of Paragraph 12.

13. Denies each and every allegation stated in Paragraph 13 of the Complaint.

### FIRST AFFIRMATIVE DEFENSE

14. The Complaint fails to state a claim against the defendant upon which relief can be granted.

### SECOND AFFIRMATIVE DEFENSE

15. On or about February 17, 1972, Rath was named as a defendant in a suit brought against it by the People of the State of California in the Superior Court of the State of California for the County of Riverside, case number 101876. Pursuant thereto, plaintiff filed a cross-complaint against defendant herein on or about March 30, 1972. The cross-complaint was for declaratory relief and injunction, based upon the same claim for relief as that set forth in the Complaint herein. The parties to such action and to this proceeding are identical.

On May 6, 1972, the Superior Court for the County of Riverside, after an extensive hearing, granted the application of the People of the State of California for a preliminary injunction, and denied Rath's application for a preliminary injunction against this defendant.

On August 8, 1972, this defendant filed a Motion for Summary Judgment against Rath in the State court proceeding. A hearing on the Motion was held on September 12, 1972. On November 14, 1972, the Superior Court entered the following order:

(a) That the enforcement of the California law and regulations in ordering off sale packaged meat food products packed in a Federally inspected establishment when such packaged meat food products are misbranded as to weight and are outside the establishment, does not constitute the imposition of marking, labeling, packaging or ingredient requirements in addi-

tion to, or different than, those imposed under the Federal Act.

(b) That the enforcement of the California law and regulations in ordering off sale the packaged meat food products packed in a Federally inspected establishment when such packaged meat food products are misbranded as to weight and are outside the establishment, is not preempted by the Federal Act.

(c) That the Cross-Complaint against Cross-Defendant Jones to enjoin him from ordering off sale packaged meat food products packed in a Federally inspected establishment when such packaged meat food products are misbranded as to weight and are outside the establishment, be denied.

On November 14, 1972, the Superior Court entered Summary Judgment in favor of Jones and against Rath. On November 15, 1972, the Clerk of the Superior Court served notice to all parties of the Entry of Summary Judgment.

### THIRD AFFIRMATIVE DEFENSE

16. In doing the acts complained of in both the first and second causes of action of the Complaint, defendant was duly authorized by and acted under the authority of Division V, Chapter 1, of the California Business and Professions Code (commencing with Section 12001 *et seq.*), and 4 California Administrative Code, Chapter 8, subchapter 2, article 5 (§§ 2930 *et seq.*). Defendant further acted in accordance with the requirements of the Federal Wholesome Meat Act of December 15, 1967, Pub. L. 90-201, 81 Stat. 587 (21 U.S.C. 601 *et seq.*).



Defendant's said actions constitute a reasonable exercise of the police power of the State of California to protect the general health and welfare of its citizens.

WHEREFORE, defendant prays for judgment as follows:

1. That plaintiff's Complaint be dismissed and that no relief be granted to plaintiff thereunder;
2. For costs of suit incurred herein by defendant; and
3. For such other and further relief which the Court may deem just and proper.

Dated: December ....., 1972.

RAY T. SULLIVAN, JR.,  
County Counsel  
by /s/ Loyal E. Keir  
Loyal E. Keir,  
Deputy County Counsel  
Attorneys for Joseph W. Jones,  
Director of Department of  
Weights and Measures.

**Affidavit of Morris Y. Kinne.**

United States District Court, Central District of California.

The Rath Packing Company, a corporation, Plaintiff, vs. Joseph W. Jones as Director of the County of Riverside Department of Weights and Measures, Defendant. Civil Action No. 72-608-R.

State of California, County of Los Angeles—ss:

MORRIS Y. KINNE, being first duly sworn according to law, deposes and says:

I am a resident of Waterloo, Iowa and the Secretary of The Rath Packing Company ("Rath"), a corporation organized and existing under the laws of the State of Iowa with its principal place of business located at Waterloo, Iowa. Rath is engaged in interstate commerce and operates a number of meat food products manufacturing plants throughout the United States, including a plant located in the City of Vernon, County of Los Angeles, State of California.

Joseph W. Jones as Director of the County of Riverside Department of Weights and Measures, acting through deputies and inspectors of the County of Riverside Department of Weights and Measures, is ordering "off sale" packages of bacon and other meat food products (wieners, luncheon meats, etc.) prepared and sold by Rath and in the hands of dealers on the grounds that the statement on the package of such meat food product of the quantity of contents of such meat food product package in terms of weight is not accurate at the time of possession by the dealer. An example of the off-sale orders and tags used is Exhibit A hereto.

The threat of further such "off sale" orders by the Riverside County Department of Weights and Measures has caused and is causing Rath to overpack approximately six thousand pounds of meat food products in its packages each week, since each article prepared at the Vernon plant potentially may be distributed in Riverside County.

Said acts daily are causing Rath great, immediate and irreparable injury, loss and damage to its reputation and good will with its customers and the ultimate consumer for which pecuniary compensation affords no adequate relief, in addition to monetary damages substantially in excess of \$10,000 but whose exact amount will be extremely difficult or impossible to ascertain.

Each Rath plant is registered with the United States Department of Agriculture and is inspected at all times by authorized representatives of the Secretary of Agriculture of the United States as required by 21 U.S.C. § 601, *et seq.* Each Rath plant generally is designated as Official Establishment No. 186 (sometimes with a suffix serial letter). All meat food products packaged by Rath have been and are prepared, packaged and labeled by Rath under inspection by the United States Department of Agriculture in accordance with the federal Wholesome Meat Act of 1967.

The labeling of all bacon and other meat food products packaged and sold by Rath at its Vernon Plant and at each other Rath plant, including without limitation an accurate statement of the quantity of

the contents thereof in terms of net weight, is performed by Rath in accordance with the regulations of the United States Department of Agriculture, i.e., under 21 U.S.C. §§ 601(n)(1) and 5, 607; under Title 9, Code of Federal Regulations, Part 317; and under the Manual of Meat Inspection Procedures of the United States Department of Agriculture.

Pursuant to the foregoing regulations and requirements, Rath is required to mark, and does mark, on the label of each meat food product package an accurate statement of the quantity of contents of such meat food product package in terms of weight, exclusive of wrappers and packing substances, at the time such meat food product package leaves Rath's plant.

Each package of bacon and other meat food product which is prepared, labeled and sold by Rath, including but not limited to each package of bacon and other meat food product which has been ordered "off sale" as aforesaid, has been prepared by Rath under inspection by the United States Department of Agriculture in accordance with the federal Wholesome Meat Act of 1967.

These meat food products lose some moisture during the course of good distribution practices. In a non-hermetically sealed package, the moisture is lost to the atmosphere and/or by absorption into the packaging material; in a hermetically sealed package, the moisture is lost by condensation onto and/or by absorption into the packaging material. Either way, Jones does not recognize the loss. This, together with some

unavoidable deviation in good manufacturing practices as recognized by the United States Department of Agriculture, is the reason why the Riverside County Department of Weights and Measures can find some packages of meat food products in the hands of dealers whose net contents will weigh several sixteenths of an ounce per pound below the net weight stated on the label. The net contents of some packages of meat food products in the hands of dealers also will weigh several sixteenths of an ounce per pound over the net weight stated on the label because of unavoidable deviation in good manufacturing practices.

/s/ Morris Y. Kinne  
Morris Y. Kinne

Subscribed and sworn to before me this 26th day  
of March, 1973.

/s/ Arlene Goldberg  
Notary Public

[Seal]

**Amended Order.**

United States District Court, Central District of  
California.

The Rath Packing Company, a corporation, Plaintiff,  
v. M. H. Becker as Director of the County of Los  
Angeles Department of Weights and Measures, De-  
fendant. C. B. Christensen as Director of Agriculture  
of the State of California, Intervenor. Civil Action No.  
72-607-R.

The Rath Packing Company, a corporation, Plaintiff,  
v. Joseph W. Jones as Director of the County of  
Riverside Department of Weights and Measures, De-  
fendant. Civil Action No 72-608-R.

Pursuant to the Opinion of the United States Court  
of Appeals for the Ninth Circuit in cases Nos. 73-  
2481, 73-2482, 73-3092, 73-2496 and 73-3180, entered  
October 29, 1975, the order of this District Court  
in cases Nos. 72-607-R and 72-608-R hereby is amended  
to read as follows:

**IT IS ORDERED:**

(1) that this Court has jurisdiction over the  
subject matter of this case, personal jurisdiction  
being conceded;

(2) that Title 9 Code of Federal Regulations  
§ 317.2(h)(2) is valid;

(3) that the Wholesome Meat Act of 1967,  
21 U.S.C. § 601 et seq., and 9 C.F.R. § 317.2(h)  
(2) preempt Cal. Bus. and Prof. Code § 12211  
and 4 Cal. Admin. Code, ch. 8, subch. 2, Art.  
5, and each of them, as to meat and meat food  
products prepared under United States Department  
of Agriculture inspection;



(4) that the Wholesome Meat Act of 1967, 21 U.S.C. § 601 et seq., and 9 C.F.R. § 317.2(h) (2) preempt Cal. Bus. and Prof. Code § 12607 (to the extent that § 12607 is interpreted to permit a definition of "net quantity" which does not recognize the reasonable variations allowed by the federal standard or which otherwise is "in addition to or different than" the federal net weight labeling requirements) and 4 Cal. Admin. Code, ch. 8, subch. 2, Art. 5.1, and each of them;

(5) that defendant and intervenor in case No. 72-607-R, and defendant in case No. 72-608-R, together with their respective successors, deputies, inspectors, officers, agents, servants, employees, attorneys and other persons in active concert or participation with any defendant or intervenor, and each of them, are restrained and enjoined permanently from applying the provisions of California Business and Professions Code section 12211 and/or section 12607 (to the extent § 12607 is preempted), and/or the provisions of Title 4, Cal. Admin. Code, ch. 8, subch. 2, Art. 5 and/or Art. 5.1, to articles prepared and marketed by plaintiff under United States Department of Agriculture's inspection in accordance with the requirements of the federal Wholesome Meat Act of 1967;

(6) that state standards not in addition to or different than the federal net weight labeling standard may be enforced by appropriate State procedures at the wholesale and retail levels; and

(7) the Court reserves the continuing jurisdiction to make any modification to the injunction

contained herein, upon proper application by any party and consonant with the Opinion of the Court of Appeals, as the ends of justice may require.

DATED: May 13, 1976.

MANUEL L. REAL  
United States District Judge

Approved as to form:

John Larson, County Counsel,  
Los Angeles County

Arnold K. Graham, Deputy County Counsel  
/s/ By: Arnold K. Graham  
Attorneys for M. H. Becker

Ray T. Sullivan, Jr., County Counsel,  
Riverside County

Loyal E. Keir, Deputy County Counsel  
/s/ By: Loyal E. Keir  
Attorneys for Joseph W. Jones

Evelle J. Younger, Attorney General

Allan J. Goodman, Deputy Attorney General  
/s/ By: Allan J. Goodman  
Attorneys for L. T. Wallace  
(successor to C. B. Christensen)

Order of the United States District Court, dated April 3, 1973, is in the Appendix to the Petition, page 68.

**L. T. Wallace v. The Rath Packing Co.**

**Pre-Trial Conference Order.**

United States District Court, Central District of California.

The Rath Packing Company, a corporation, Plaintiff, vs. M. H. Becker as Director of the County of Los Angeles Department of Weights and Measures, Defendant. C. B. Christensen as Director of Agriculture of the State of California, Intervenor. Civil Action No. 72-607-R.

Following pre-trial proceedings pursuant to Rule 16 of the Federal Rules of Civil Procedure and Local Rule 9 of this Court,

IT IS ORDERED:

**I**

A. This is an action by plaintiff The Rath Packing Company for declaratory and injunctive relief arising out of a dispute as to the application of the federal Wholesome Meat Act of 1967 (21 U.S.C. §§ 601 *et seq.*); California Business and Professions Code §§ 12024, 12024.5 and 12211; and regulations promulgated under each of the foregoing.

This action is against defendant M. H. Becker as Director of the County of Los Angeles Department of Weights and Measures and intervenor C. B. Christensen as Director of Agriculture of the State of California.

The pleadings raising the issues of this action are plaintiff's Complaint, the Answer by defendant Becker, and the Answer by intervenor Christensen.

B. This action also includes a counterclaim by intervenor C. B. Christensen for declaratory and injunctive relief arising out of the same dispute, alleging that the federal Wholesome Meat Act of 1967 requires accurate weight at retail.

This counterclaim is against plaintiff The Rath Packing Company.

The pleadings raising the issues in this action are intervenor's Counterclaim and Rath's Reply to that Counterclaim.

**II**

Federal jurisdiction and venue are invoked upon the following grounds:

1. General federal question jurisdiction (28 U.S.C. § 1331). This action arises under the federal Wholesome Meat Act (21 U.S.C. §§ 601 *et seq.*). The matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$10,000.

2. Diversity jurisdiction (28 U.S.C. § 1332). Plaintiff The Rath Packing Company is a corporation organized and existing under the laws of the State of Iowa, having its principal place of business in Waterloo, Iowa. Defendant Becker and intervenor Christensen are California citizens. This action is between citizens of different states. The matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$10,000.

3. Specific federal question jurisdiction (21 U.S.C. § 674). This action arises under the federal Wholesome Meat Act (21 U.S.C. §§ 601 *et seq.*) and seeks to enforce the provisions of that Act and to restrain and prevent violations thereof.



4. This also is a civil action for a judgment declaring the rights and other legal relations of the parties hereto pursuant to 28 U.S.C. §§ 2201 and 2202 in respect to an actual controversy between them which is within the jurisdiction of this Court.

### III

The following facts are admitted and require no proof:

1. Plaintiff and Counterdefendant The Rath Packing Company (hereinafter referred to as "Rath") is a corporation organized and existing under the laws of the State of Iowa and has its principal place of business in Waterloo, Iowa.

2. Defendant M. H. Becker (hereinafter referred to as "Becker") is Director of the County of Los Angeles Department of Weights and Measures and is a California citizen.

3. Intervenor and Counterclaimant C. B. Christensen (hereinafter referred to as "Christensen") is Director of Agriculture of the State of California and is a California citizen. Christensen, as Director of Agriculture of the State of California, is the officer of the State of California charged with (a) enforcement of California weights and measures statutes (contained in Division V of the California Business and Professions Code), (b) supervision of enforcement of said statutes by county sealers (Directors of Weights and Measures) including without limitation Becker, and (c) promulgation, enforcement and supervision of enforcement of regulations adopted pursuant to the authority granted to the Director in said Division V.

4. This action arises under the federal Wholesome Meat Act of 1967 (21 U.S.C. §§ 601 *et seq.*). This

action is between citizens of different states. The matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$10,000. Jurisdiction is based upon 28 U.S.C. §§ 1331 and 1332 and 21 U.S.C. § 674. This is also a civil action for a judgment declaring the rights and other legal relations of the parties hereto pursuant to 28 U.S.C. §§ 2201 and 2202, in respect to an actual controversy between them which is within the jurisdiction of this Court. Venue is based upon 28 U.S.C. § 1391.

5. Rath is engaged in interstate commerce and is subject to the provisions of the Wholesome Meat Act of 1967 (21 U.S.C. §§ 601 *et seq.*). Each Rath establishment preparing meat food products has been granted an official inspection number by the United States Department of Agriculture under Title 9, C.F.R. § 305.1(a).

6. Among its activities, Rath packages bacon in containers with the purpose and expectation that, after filling, such containers will be sold to consumers. Prior to filling each container with bacon, Rath causes each container to be printed with, among other things, the following information;

(a) a statement of the quantity of contents of the container (when filled) in terms of weight, exclusive of wrappers and packing substances; and

(b) the Rath name or other trade names or markings.

7. With the knowledge and approval of Rath, the described containers of bacon packaged by Rath have been sold to consumers through retail outlets in Los Angeles and other California counties since at least April 1, 1971. The bacon so packed is sold for human food purposes.



8. During the period April 1, 1971 through March 23, 1972, Los Angeles County Weights and Measures officials inspected packages of Rath bacon when displayed and offered for retail sale to consumers in said county and, allegedly pursuant to the standards of California Business and Professions Code § 12211 and 4 California Administrative Code §§ 2930 *et seq.* and during the period September 1971 through March 1972, ordered "off sale" approximately eighty-four (84) lots of bacon packaged by Rath.

9. Rath knew or was informed of many of these "off sale" orders.

10. During the period April 1, 1971 through March 1, 1972, Weights and Measures officials of other California counties similarly have ordered "off sale" some packages of bacon prepared by Rath.

\* \* \*

## VI

At the instance of Becker and Christensen, Rath agrees that the factual issues of this action may be limited to those concerning the meat food product *bacon* as that product was or is processed, packaged and sold within the County of Los Angeles, State of California, during the period commencing April 1, 1971. The parties now believe that the legal issues so raised are applicable to other products subject to the Wholesome Meat Act. This limitation may be contested by Rath before trial of this action upon a showing of manifest injustice resulting therefrom.

The following issues of fact, and no others, remain to be litigated upon trial.

### *Rath's Statement of Factual Issues:*

1. Was the bacon at issue herein prepared at a Rath establishment under inspection in accordance with the requirements under subchapter I of the Wholesome Meat Act of 1967?

2. How did Christensen and Becker (and/or their subordinates) determine the net content weight of the bacon which they inspected, and how did they determine whether to order it "off sale" (i.e., what standard did they apply to determine whether the contents were "unreasonably less" than the labeled net weight)?

### *Becker's and Christensen's Statement of Factual Issues:*

1. The procedure used by Rath to package its bacon products did not meet USDA standards for net weight control.

2. USDA inspectors do not provide continuous inspection of Rath's in-plant net weight procedures.

3. M. H. Becker recognizes reasonable variations from stated quantity of contents caused by gain or loss of moisture during the course of good distribution practices or by unavoidable deviations in good manufacturing practices in applying California Business and Professions Code section 12211 and 4 California Administrative Code sections 2930 *et seq.* (Article 5). Each deputy sealer is instructed to and does strictly adhere to the standards of the stated laws.

4. The inspections referred to in section III, paragraph 8 of this order were performed in accordance with the requirements of California Business and Professions Code section 12211 and 4 California Administrative Code sections 2930 *et seq.* (Article 5). Two hundred and eight lots of Rath bacon were inspected at retail during the period specified. Fifteen of these

lots were short weight but within the variations permitted by Article 5. Eighty four of these lots were unreasonably short weight and were ordered off sale pursuant to section 12211 and Article 5. The eighty four lots ordered off sale represent 40.4% of the lots of Rath bacon inspected. Only packages and lots of Rath bacon which did not meet the standards of Business and Professions Code section 12211 and 4 California Administrative Code sections 2930 *et seq.* (Article 5) were ordered off sale.

5. 4 California Administrative Code sections 2930 *et seq.* (Article 5) (1) is a validly promulgated regulation currently in force (2) contains a statistically valid sampling procedure (3) recognizes and incorporates "reasonable variations" for each lot.

6. Although the United States Department of Agriculture has the authority to inspect meat food products at the retail level to assure accuracy of weight representations, it has not done so and has relied upon the states for such weights and measures enforcement.

7. Rath derives monetary and other benefit from the sale of packages of bacon bearing the information specified in Section III paragraph 6 of this order.

8. Between November 1971 and March 1972, the Los Angeles County Department of Weights and Measures conducted one formal office hearing and had other meetings and informal contacts with Rath officials, including Rath quality control personnel. During these meetings, Rath was informed of the continuing adverse inspection reports and was given opportunities to alter its practices so that Rath bacon would meet the standards enforced by the Los Angeles County Department of Weights and Measures.

9. On February 17, 1972, the Riverside County District Attorney filed a civil action against Rath for injunction and other relief arising from Rath's continued misbranding of packaged bacon.

10. On March 1, 1972, the Los Angeles County District Attorney filed a civil action against Rath for injunctive and other relief arising from Rath's continued misbranding of packaged bacon.

## VII

The exhibits to be offered at the trial, together with a statement of all admissions by and all issues between the parties with respect thereto, are as follows:

### *Rath's Exhibits:*

Number	Description
1	Manual of Meat Inspection Procedures of the United States Department of Agriculture, specifically Sections 317.32, 317.33 and 317.34 on net weight compliance.
2	Rath's "Net Weight Compliance Procedure" —'70 rev.
3	Letter from United States Department of Agriculture dated 4-20-70 by Irwin Fried approving procedure as revised.
4	Control charts from 3-1-71 to latest practical date showing results of hourly weight checks on bacon made at Rath's Vernon plant.
5	Two weight checks made in Vernon plant in 1971 by Los Angeles County Department of Weights and Measures.
6	Mayfair Markets, Inc. check for returned product—(private label sliced meats).



*Becker's and Christensen's Objections to Rath's Exhibits:*

*Exhibits 1, 2 and 3*

Becker and Christensen do not dispute that these exhibits are true copies but reserve objections as to the conclusions contained therein.

*Exhibit 4*

Becker and Christensen reserve objections to introduction of this exhibit (1) for lack of proper foundation, (2) as hearsay, and (3) as to the truth of the contents thereof.

*Exhibit 6*

Becker and Christensen object to introduction of this exhibit (1) as it is irrelevant to the issues of this action, and (2) for lack of a proper foundation.

*Becker's and Christensen's Exhibits:*

Number	Description
A	Department of Weights and Measures Certificates of Inspection—Re: Off-Sale Orders of Rath packaged bacon. Certificate numbers: C-22231, 22940, 22981, 22986, 23194, 23753, 24205, 24872, 24880, 25268, 25281, 25546, 26310, 26314, 26320, 26945, 27673, 30170, 30172, 30175, 30272, 30435, 30439, 30462, 30473, 30791, 35723, 35728, 35775, 35777
B	Department of Weights and Measures Certificates—Re: Release of Off-Sale Bacon Products packaged by Rath.

Number	Description
	Certificate numbers: C-10204, 10206, 21744, 22237, 23222, 23243, 23473, 24301, 25110, 25148, 25258, 25282, 25293, 25296, 25938, 26356, 26361, 26375, 26377, 26382, 26399, 26405, 26408, 26429, 27672, 27758, 27766, 28103, 28387, 28388, 29647, 29808, 30048, 30390, 30419, 30444, 30456, 30955, 31759, 31760, 31767, 31780, 31798, 34645, 35171, 35715, 35730, 35739, 35747, 36168, 36178
C	All "Audit Inspection" reports relative to the inspection of Rath packaged bacon between September 1971 through March 1972.
D	All "Article V Package Inspection Reports" relative to Rath packaged bacon between September 1971 through March 1972.
E	Department of Weights and Measures Statistical Summary Sheets of Weight Deviations of Rath packaged bacon for the months of September 1971 through March 1972.
F	Letter from Richard Lyng, Assistant Secretary of the United States Department of Agriculture, to C. B. Christensen, Director of the California Department of Agriculture, dated July 17, 1972.

*Rath's Objections to Becker's and Christensen's Exhibits:*

As to each exhibit, Rath disputes the truth of relevant matters of fact set forth therein, and reserves objections



as to the admissibility in evidence thereof on grounds of lack of foundation, hearsay, incompetency, irrelevancy and immateriality.

### VIII

There is no issue in this action related to Health and Safety Code § 26550, Business and Professions Code § 17500 or Civil Code § 3369.

The following issues of law, and no others, remain to be litigated upon the trial:

#### *Rath's Statement of Legal Issues:*

1. Are Becker and/or Christensen imposing marking, labeling and/or packaging requirements in addition to, or different than, those made under the Wholesome Meat Act of 1967 with respect to bacon prepared at a Rath establishment under inspection in accordance with the requirements under Subchapter I of the Wholesome Meat Act of 1967?

2. Do California Business and Professions Code §§ 12024, 12024.5 and 12211 and/or 4 California Administrative Code, Chapter 8, Subchapter 2, Article 5 (§ 2930 *et seq.*), as they are being applied by Becker and Christensen, constitute marking, labeling and/or packaging requirements in addition to, or different than, those made under the Wholesome Meat Act of 1967 with respect to bacon prepared at a Rath establishment under inspection in accordance with the requirements under Subchapter I of the Wholesome Meat Act of 1967?

#### *Becker's and Christensen's Statement of Legal Issues:*

1. Is a package of a meat food product bearing a statement of quantity in terms of weight which was packed in an establishment subject to federal

inspection pursuant to the federal Wholesome Meat Act (21 U.S.C. §§ 601 *et seq.*) "misbranded" as the term is used in said act if it contains an amount of edible meat food product (exclusive of wrappers and packing substances) which is unreasonably less than the amount thereof stated upon the package when such package is outside of such an establishment, (*e.g.*, at point of display and offer for retail sale)?

2. Is a lot of packaged meat food product, comprised of packages bearing the same statement of quantity in terms of weight, which lot was packed in an establishment subject to federal inspection pursuant to the federal Wholesome Meat Act (21 U.S.C. §§ 601 *et seq.*), "misbranded" as that term is used in said act if the average weight of the lot sampled is less than the amount represented upon the packages when displayed and offered for retail sale?

3. May the Secretary of Agriculture detain or order off sale packages or lots of meat food product bearing a statement of quantity in terms of weight which were packed in an establishment subject to federal inspection pursuant to the federal Wholesome Meat Act (21 U.S.C. §§ 601 *et seq.*) when such packages are misbranded and are outside of such an establishment (*e.g.*, at point of display and offer for retail sale)?

4. May California Weights and Measures officials detain or order off sale packages or lots of meat food product bearing a statement of quantity in terms of weight which were packed in an establishment subject to federal inspection pursuant to the federal Wholesome Meat Act (21 U.S.C. §§ 601 *et seq.*) when such packages are misbranded and are outside of such an establishment (*e.g.*, at point of display and offer for retail sale)?

5. Are California Business and Professions Code §§ 12024, 12024.5, 12211 and 4 California Administrative Code, Chapter 8, Subchapter 2, Article 5 (§§ 2930 *et seq.*) valid means of enforcing the misbranding standards of the federal Wholesome Meat Act which relate to weight?

In the alternative, does the reserved Police Power of the States or the federal Wholesome Meat Act's grant of concurrent jurisdiction to the states permit the promulgation and enforcement by the State of California of misbranding regulations more stringent than those made by the federal government pursuant to the Wholesome Meat Act?

6. Did M. H. Becker as Director of the County of Los Angeles Department of Weights and Measures act in accordance with state and federal laws when he ordered off sale lots of bacon packaged by Rath which were misbranded (*i.e.*, were unreasonably short weight as determined by 4 California Administrative Code §§ 2930 *et seq.*) when displayed and offered for retail sale?

7. May Rath be enjoined from selling, offering for sale, permitting to be offered for sale or permitting to be sold for human food purposes at the retail level meat food products packaged in establishments subject to the Wholesome Meat Act, which packages contain a statement of quantity in terms of weight and which are misbranded at time of display and offer for retail sale?

## IX

The foregoing admissions having been made by the parties and the parties having specified the foregoing issues of fact and law remaining to be litigated, this

order shall supplement the pleadings and govern the course of the trial of this cause, unless modified to prevent manifest injustice.

DATED: September 25, 1972.

/s/ Manuel L. Real  
United States District Judge

Approved as to form and content:

/s/ Dean C. Dunlavey  
Attorney for Plaintiff Rath

/s/ Arnold K. Graham 9/20/72  
Attorney for Defendant Becker

/s/ Allan J. Goodman  
Attorney for Intervenor Christensen

**Civil Minutes—General.**

United States District Court, Central District of California.

Case No. 72-607-R.

Date 3-5-73.

Title: Rath Packing v. M. H. Becker, et al.

**DOCKET ENTRY:**

Court orders submission of case vacated and case set for further trial 3-27-73 at 9:30 a.m. and consolidated with 72-608-R for trial.

Present: Hon. /s/ M. L. Real, Judge; /s/ Tamara Saunders, Deputy Clerk; /s/ Florence Carcia, Court Reporter.

Attorneys Present for Plaintiffs: /s/ Dean C. Dunlavey; Attorneys Present for Defendants: none present.

Proceedings: Court orders the submission of this case is vacated and the case is set for further trial on Mar. 27, 1973 at 9:30 a.m. and consolidated with No. 72-608-R.

[RT 27-28]

**HUNTER COHEN,**

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

**THE CLERK:** Will you state your true and correct name.

**THE WITNESS:** Hunter Cohen.

[RT 30]

**Q** Would you tell the court your present capacity within the United States Department of Agriculture?

**A** Sub-area supervisor for Southern California.

[RT 32]

**Q** Would you tell the court what laws are enforced by the United States Department of Agriculture in the inspection of meat in general but in bacon in particular?

**A** The law commonly referred to as the Wholesome Meat Act.

[RT 34-35]

**Q** Has the Rath establishment at Vernon, California been granted inspection by the Department of Agriculture?

**A** It has.

**Q** What official number has it been assigned?

**A** 186L.

**Q** And can you tell the court the effective date of that granting of inspection?

**A** Effective June 7, 1965.

**Q** Has that inspection been continuous in effect from that date to the present?

**A** It has.

**Q** From at least April 1971 until the present has there been one or more inspectors of the United States Department of Agriculture assigned to the Rath Vernon plant?

**A** Yes, there have.

**Q** Has the purpose of the assignment of those inspectors been to enforce the federal laws and regulations that you have already described?

**A** It has.

[RT 67]

**Q** In any of the records of the USDA, Dr. Cohen, is there any record that any bacon ever left the Rath establishment from April '71 to the present time that was not correctly labeled as to net weight?



A There is no such record.

Q Do you have any knowledge or information that any bacon ever left the Rath establishment from April '71 to the present that did not meet the net weight requirements imposed by the United States Department of Agriculture?

A No, I do not.

[RT 68-69]

Q Do you have any personal knowledge or do you have any information ascertained from the United States Department of Agriculture records that any bacon left the Rath Vernon establishment from April 1971 to the present that was not in compliance with the labeling and weight requirements of the federal laws and regulations?

THE WITNESS: No.

\* \* \*

[RT 82]

Q To your knowledge are inspectors assigned to the Rath plant continuously?

A As continuously as any other establishment, yes.

Q I don't know that that is responsive.

Are they assigned to the Rath plant continuously during the entire production period of the Rath plant?

A The answer is no.

Q Why not?

A Because the service of a full time inspector at the Rath plant is not always required. There are times when the services of an inspector can be used in more than one establishment.

Q Are you saying then, Dr. Cohen, that is not continuous inspection of the Rath plant?

A No, I am not. There is continuous inspection at the Rath plant.

[RT 83]

Q Are you saying that your inspectors continuously inspect the Rath plant all the time the plant is in production of bacon?

A Or any other meat food product, yes.

[RT 86-87]

Q Dr. Cohen, in such inspection as it makes of bacon weight at the Rath Vernon establishment does the United States Department of Agriculture use a dry tare or a wet tare?

A Dry tare within the definition that I heard you make.

Q In my opening argument?

A In your opening statement.

Q My argument was not evidence so would you tell the court what the tare means?

A The tare is the packaging materials for the unit being weighed for determination of net weight stabilized so it is maintained under the same conditions of humidity and temperature as the packaging material being used in the line.

Q Would you tell the court what the word dry means as opposed to a description of tare?

A Within the definition again which you proposed and which is not used to my knowledge by the department, it refers to the packaging material, the weight of the packaging material before it is filled with the product.

Q Does that imply that the tare weight does not include anything that has been absorbed from the product itself?

A It does.

[RT 87-88]

Q Does the United States Department of Agriculture in its inspection as to net weight conduct its inspection before the product leaves the plant or after the product leaves the plant?

A Before it leaves the plant.

[RT 88-89]

Q Dr. Cohen, you have testified that in the plant inspections a dry tare is used. Does your department to your knowledge make inspection outside the plant after the product has left the establishment?

A It becomes a matter of the definition of inspections. To my knowledge there are reviews of product at retail to assure that they have not become adulterated or mishandled. But this is done by a separate authority. Our compliance and review staff.

Q Is that under Mr. Hutchings?

A That is correct.

Q To your knowledge does the department check for misbranding of packages outside the plant?

A Yes, it does.

[RT 90]

CHESTER ARTHUR JAENSEN,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

THE CLERK: Would you state your true and correct name.

THE WITNESS: Chester Jaensen, J-a-e-n-s-e-n.

[RT 90-91]

Q Would you tell the court your present employment?

A Rath Packing Company.

Q At what location?

A At the Vernon plant, Los Angeles branch.

Q And what is your position there at the present time?

A Plant manager.

Q Has that been your position continuously since at least April 1971?

A Yes.

[RT 91]

Q Have you observed the Department of Agriculture inspectors in your plant?

A I have.

Q Have they been there daily since at least April '71 to the present time?

A They have.

Q Do these inspectors have access to all parts of the plant at all times, day or night?

A They do.

[RT 96-97]

Q Would you tell the court in a little more detail the nature of the makeup of this board upon which the approximately one pound draft is put?

A Well, we currently are using two boards. They are hardboard construction. One is wax coated and the other is polyethylene coated.

Q What kind was used predominantly in the year 1971?

A The wax coated board.

Q And how long into 1972 did it continue to be used?

A Until March of '72.

Q Is it still being used for certain qualities of bacon?

A Yes, it is.



[RT 97-100]

Q Would you tell the court a little more thoroughly what happens to the bacon after these approximately one pound increments on there, drafts on the board, are conveyed down the line?

A They are conveyed to a scale station where an operator either adds or subtracts bacon to bring them into a predetermined target area that is clearly marked on the face of her scale.

After scaling she then places the draft of bacon back on a line that conveys it to an overwrap carton machine called a tux wrap machine. There is a tux operator who then inserts the wrapped bacon into the overwrap carton. It has a pre-applied adhesive on the end that is heat activated and sealed.

Q Is this entire process from slicing machine to sealing of the carton accessible for inspection by the United States Department of Agriculture inspector?

A Yes, it is.

Q Does the scaler, this person who weighs the bacon, bring the bacon to exactly one pound?

A No, she does not.

Q Would you tell the court exactly what kind of weight limits the scaler does achieve at the processing line?

A We have established a pass zone of 10/16ths of an ounce wide that is centered on the target weight.

Q What is the target weight with respect to the pass zone?

A Their current target weight?

Q No, just in general what is the relationship between the target weight and the pass zone?

A The pass zone is centered on the target weight.

Q You are saying the target weight is the midpoint of the pass zone?

A Yes.

Q Do I understand you correctly that this person either adds or subtracts bacon until the weight of the bacon falls somewhere within the pass zone?

A That is correct.

Q What was the pass zone with respect to an even pound that was being used by the Rath Company as of April 1, 1971?

A At that time our pass zone was minus 2-plus 8.

Q Would you tell—

A This would be 2/16ths understated net weight through 8/16ths overstated net weight.

Q Sixteenths of what?

A Of an ounce. This would give us a target weight of 3/16ths of an ounce overstated net weight.

Q Was that pass zone subsequently changed?

A Yes, it was.

Q Can you tell the court approximately when and the nature of the change.

A On October 27, 1971 it was changed to a zero plus 10 which gives us a 5/16ths of an ounce overstated net weight.

Q Was it thereafter changed?

A Yes.

Q Excuse me, let me back up.

What was the reason for the change in October of '71?

A It was changed because of pressures being applied at that time by the L.A. Department of Weights and Measures.

Q By pressures, you refer specifically to what?

A Off sale orders.

Q Was the pass zone changed after October '71?

A Yes.



Q Can you tell the court approximately when and how?

A On January 12, 1972. It was changed to a plus 2-plus 12.

Q And the reason?

A Again due to off sale orders.

Q By—

A The L.A. County Weights and Measures.

Q Was the pass zone subsequently changed?

A Yes, it was.

Q Tell the court when and how.

A On March 2, 1972 it was changed to plus 7-plus 17.

[RT 100-102]

Q Was it thereafter changed?

A Yes, it was.

Q Tell the court how and when.

A On April 29. We had—when we started using the poly inserts. On some of the bacon it was reduced to plus 3-plus 13.

Q And with respect to what kind of product and what kind of package?

A All product that was packed on the polyethylene insert which at that time included one pound product. The balance of the product that was packed at that time was left at the plus 7-plus 17 because it was still being packed on a wax insert.

Q Would you tell the court what the relationship is between the kind of board and the amount of pass zone for overpack?

A Well, the plus 7-plus 17 gives us 12/16ths of an ounce overpack. And the plus 3-plus 13 gives us 8/16ths of an ounce overpack from stated net weight.

Q Why do you have a lesser overpack on a polyethylene board than as on a wax board?

A The polyethylene board does not absorb moisture or wick, like a wax board will.

Q During the period April, 1971 to the present time what has been the lowest target overpack that has been used at the Rath Vernon plant?

A Three-sixteenths of an ounce overstated net weight.

Q Does that mean that the net content of bacon is 3/16ths over an even pound if it happens to be the pound package?

A On the average, yes.

Q Can you tell the court the cost to Rath of the overpackage which has exceeded 3/16ths of an ounce from October '71 to the present time.

\* \* \*

THE COURT: Has it been more than \$10,000?

THE WITNESS: Yes.

[RT 107]

Q Is the average weight of the bacon essentially the target weight for that particular range run?

A Yes, it is.

[RT 108-109]

Q What is the average time that the bacon will remain inside the Rath plant in that cooler before it is shipped?

A Approximately four days.

Q And approximately the maximum time that bacon would ever stay in the cooler before shipment?

A No more than eight or nine.

[RT 110]

Q Has Rath paid to customers in excess of \$10,000 since April 1971 as compensation for products that have been returned by those customers to Rath because of the off sale activities of the Department of Weights and Measures of Los Angeles County?

THE WITNESS: Yes, they have.

[RT 118]

Q So it would be a correct statement that if the product passes at the point immediately after slice that it would not be inspected by the Rath personnel prior to shipment?

A No, no, it would not be inspected again.

Q So the answer to my question is yes, it would not be inspected at another later point prior to shipment?

A That is correct.

[RT 131-132]

Q Can you tell us how much moisture is absorbed by a polyethylene board, if any?

A I can say approximately 4/16ths ounce is absorbed less in the polyethylene than in the wax.

Q So then does the polyethylene absorb any moisture at all?

A I don't know.

Q But it does absorb 4/16ths of an ounce less than a wax board?

A Yes.

[RT 133]

Q Do you know how much moisture would be lost during in-plant storage?

A Approximately.

Q What is that approximation?

A One-sixteenth of an ounce.

[RT 135]

Q Mr. Jaensen, do you know whether a federal inspector is always on the premises of the Rath Vernon plant during the night shifts?

A Yes, I do.

Q Is a federal inspector continuously on the premises of the Rath Vernon plant during the night shifts?

A No.

Q And this has been the case since April 1971 through this date?

A That is correct.

[RT 139]

Q Does your company have a control date on the packages when they are placed in shipping?

A Yes.

Q What is the length of that control date?

A I don't know whether you would call it control date or not. We date 21 days out on the package from the time it is packed.

[RT 140]

Q Mr. Jaensen, is there a point of time after you market a package to your customers beyond which you will not allow it to be returned to your plant for any reason?

A That is correct.

Q What is that period of time?

A 21 days from the date of pack.

[RT 141]

Q Mr. Jaensen, do you have any control over the packages which leave your plant after they leave the plant?

A No.

Q You do not ever assume any control over the packages?

A Do we have control of them?

Q Do you have control or do you ever assume control of the packages?

A No.

[RT 142]

THE COURT: \* \* \* Do you pick up from a retailer who has been given an off sale notice?

THE WITNESS: Yes, we do, your Honor.

\* \* \*

Q On all your bacon which has been ordered off sale?

A That we are notified of.

Q Even if it is beyond the 21 day period?

A Yes.

Q You pick it up?

A Yes.

Q Do you credit them? Do you give them a monetary credit?

A Yes.

Q Even beyond the 21 day period?

A Yes.

Q You are certain of that?

A Yes.

[RT 143]

Q And that you have packaged with polyethylene coated inserts and boards to eliminate the loss of some of the moisture from the product, you have done this?

A Yes, sir.

[RT 147]

Q To your knowledge is there anything that will cause the package of bacon to lose weight from the time it is packaged until the time it leaves the Rath shipping cooler except for this 1/16th ounce loss of moisture that you have already testified to?

A I would assume that there would be some absorption if we were looking at the wax board. But I wouldn't—

Q But as far as weight getting out of the package entirely is there anything other than the 1/16th?

A No, sir, not that I know of.

Q Is it a correct inference then that the weight of the bacon when it leaves the plant is the overpack less its moisture loss in the cooler?

A That is correct.

[RT 159]

HAROLD BAKER,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

THE CLERK: Would you state your true name.

THE WITNESS: Harold Baker.

[RT 160]

Q Will you tell the court when you joined Rath.

A 1965.

Q And would you tell the court the duties and functions you have performed at Rath since that time.

A The duties at Rath involve quality procedures in all the various Rath plants for assuring conformance to our own specifications as well as the requirements of the United States Department of Agriculture.



[RT 166]

THE WITNESS: Yes. The amount of moisture lost while the product is still retained in our plant in the shipping cooler and for the periods of time less than nine days, which is what we are talking about for nearly a hundred percent of our bacon, the amount of loss due to moisture evaporation will be approximately a sixteenth of an ounce.

[RT 171-172]

Q Would you tell the court what observation you have made as to the quantitative amount of absorption which goes on and the time during which it takes place?

A The insert board itself will absorb approximately 5/16ths of an ounce in six to nine days after pack. I say absorbed. I might clarify that in that most of it is absorption in to the board. There is, however, some clingage to the board itself of grease and moisture.

Q Something that would be—

A On the surface which could be scraped off. Right.

Q If that is the amount that takes place in six to nine days what takes place after that, if any?

A The test that indicates that the board does, for lack of a better term, reach a saturation point beyond which there is no further absorption. That saturation point comes at approximately 5/16ths of an ounce.

[RT 172]

Q Do you have information also as to the rate of moisture loss under simulated retail conditions?

A Yes, I do have. The tux package bacon when exposed to the conditions typical of a retail type showcase will show a loss of moisture to the atmosphere of .3 to .4/16ths of an ounce per day during the time that it is in that case.

[RT 173-174]

Q Are you familiar with the weight sampling procedures as they are employed by the Los Angeles Bureau of Weights and Measures?

A Yes, I am.

Q Would you tell the court the kind of tare that is used in the weight at the plant as compared with the kind of tare that is used by the Los Angeles Department of Weights and Measures?

\* \* \*

THE WITNESS: Under the federal procedures and under the Rath net weight compliance program we use a dry tare. By definition a dry tare is a packaging material which has nothing on it foreign to the packaging material itself.

\* \* \*

THE WITNESS: The California procedures require the use of a wet tare which means that anything foreign to the packaging material itself is included as a part of the weight of that tare.

[RT 176]

Q Is it or is it not a correct inference that subtraction of the heavier weight of the wet tare yields a net weight determination which is less than the arithmetical deduction of the dry tare weight?

\* \* \*

THE WITNESS: Yes, it is obviously true that if the tare material or packaging material absorbs some part of the product that is put into that package that the difference will be reflected—will reflect itself as a lesser weight using a dry tare than it will as a wet tare. In the case of bacon that would be approximately 5/16ths of an ounce.

BY MR. DUNLAVEY:

Q You said a lesser weight using a dry tare. Did you mean a lesser weight subtracting the wet tare—a lesser net weight when you subtract the wet tare?

A The net weight using the wet tare will be lower than the net weight using the dry tare.

[RT 180]

Q If the California test were applied at the Rath establishment simultaneously with the application of the Rath test is it statistically possible that simultaneously applied the two tests would come to different results in the sense that one would accept the lot and one would reject it?

A Yes, it is very possible.

Q Included in that possibility is there the possibility that the Rath procedure of weighing would accept a lot whereas the California system would reject it?

A Yes.

[RT 181]

Q Have you reviewed the product inspection reports which have been submitted to Rath by the Department of Weights and Measures as part of the pretrial procedures in this case?

A Yes, I have.

Q How many lots of bacon were inspected by the department according to those reports?

A 101.

Q How many of those were passed, if any?

A There were 30 lots that were passed, 71 were rejected.

Q Did any of the lots which were rejected contain bacon weighed at a date after the retail control date stamped on the bacon package?

A Of the 71 rejected lots 21 of those lots were beyond the retail control date, that is over the 21 day retail date stamped on the package.

Q Did you make a calculation as to the average shortage in the samples contained within those 71 rejected lots, that is differences between net weight and stated net weight?

[RT 182]

A Yes, I did.

The average underweight for the 71 rejected lots was less than 4/16ths of an ounce.

Q In terms of percentage of a pound what percentage is that?

A It would be under 2 percent, under 2 percent.

Q What was the minimum sample shortage—average sample shortage of those various rejected lots—what was the sample shortage in the lot which had the least of the shortages?

A You mean which was closest to the stated net weight?

Q Correct.

A Minus .2 3/16ths of an ounce.

Q Is it your testimony that the bacon in that particular lot was ordered off sale because it was 2/10ths of 1/16th of an ounce below stated net weight?

A That is correct.

[RT 184-185]

Q You have explained to the court the differences in time when these federal and Rath weight tests are made as distinguished when the California tests are made. Although it may be self-evident, just for the record would you tell the court what consequences follow from the fact that these two tests take place at different times?

A As I recall, the PIR's, the California weight checks are performed anywhere from the day following slice to 59 days later.

Q And—excuse me.

A The weight loss due to evaporation is linear and it continues from the time that bacon is put into the retail case until the consumer actually fries it. Therefore since we are checking, again using a dry tare, in plant and assuring that the product meets the requirement of federal regulation, the weight loss due to board absorption, clingage and evaporative loss during time cannot help but make the California weights read lower than those weights determined at plant level.

Q You say weight. Do you mean net weight of contents?

A Net weight of contents.

Q Do you have an opinion as to whether those differences account at least in part for bacon being ordered—strike—for bacon failing to meet the California test although it has met the test in the plant?

A In great part, yes.

Q And your opinion is that it does or does not contribute to the difference between those two tests—let me straighten that out.

Do you have an opinion as to whether this loss of moisture during the course of distribution is a contributing factor to the fact that California can find short weight under its test as to the same produce that previously passed the federal or Rath test?

A The answer is yes, it does.

[RT 192-193]

Q Does your company utilize any particular methods, merchandising or packaging, which controls shrink after the product has been packaged?

A Product shrinks less in—in fact, product does not shrink in a vacuum package, if that is what you are asking, as opposed to the shrinkage loss that we get in the tux pack.

Q Does a different kind of insert board affect the loss of moisture from a product?

A It affects the amount of—a polyethylene-coated insert as opposed to a wax-coated insert affects the amount of absorption by the insert board, yes.

[RT 203]

Q Mr. Baker, if you removed a package of bacon from a retail display case and subtract the weight of the tare as found in the retail market from the weight of the package would the arithmetical difference be the amount of bacon meat available to the consumer?

A Yes.

[RT 204]

MAYNARD HAROLD BECKER,

called as a witness on behalf of the plaintiff, under Rule 43(b), being first duly sworn, testified as follows:



DIRECT EXAMINATION

BY MR. DUNLAVEY:

Q Mr. Becker, would you tell the court your occupation.

A Director of the Los Angeles County Department of Weights and Measures.

[RT 212]

Q Am I correct that the way in which your department measures the weight of anything that it is investigating is through use of a test procedure that is set out in the Department of Agriculture regulations?

A That is correct.

Q Specifically, is that test found in 4 California Administrative Code, Chapter 18, Subchapter 2, Article 5?

A Yes.

[RT 215-216]

Q Am I correct that in your department application of the Article 5 test procedure to bacon that your inspectors are undertaking to measure the net content weight of bacon at the point of inspection?

A Yes.

Q So if the inspector is weighing bacon in the retail store he is undertaking to measure net weight right at that point in time?

A Yes.

[RT 216-217]

Q If your inspector ascertained under the application of Article 5 that they regard a package or packages of bacon to weigh less than stated net weight are they given any instructions to investigate why

that short weight may have occurred in deciding whether to order the commodity off sale?

A No.

Q Am I correct then that as to the bacon which has been ordered off sale and which is at issue in this lawsuit your inspectors have received no instruction to investigate the kind of distribution that that product was subjected to before they weighed it?

A They are not.

[RT 218]

Q Am I correct that your inspectors make no allowance for whether a bacon package labeled one pound had net contents weighing a pound when it left the plant if they find that according to the Article 5 test the package does not have net contents of a pound at the store level?

\* \* \*

THE WITNESS: You are correct.

[RT 219]

Q Am I correct, Mr. Becker, that your department gives no recognition to loss of moisture during good distribution practice in deciding whether to order bacon off sale under the Article 5 test?

\* \* \*

THE WITNESS: The department doesn't. Article 5 gives whatever consideration is in the application of that to the packages.

BY MR. DUNLAVEY:

Q So your department—let's take it one step at a time.

Your department gives no recognition to that fact?

A No, it does not.

Q And unless Article 5 is found to do so then no recognition is given, is that correct?

A That is correct.

[RT 225]

WESLEY ROBERT MOSSBERG,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

THE CLERK: Thank you. Please take the stand. State your true and correct name, please.

THE WITNESS: Wesley Robert Mossberg.

\* \* \*

Q Mr. Mossberg, by whom are you currently employed?

A I am employed by the County of Los Angeles, Department of Weights and Measures.

Q What is your title and your job function?

A My title is Chief Weights and Measures Inspector. I head the Compliance and Investigation Division of the department.

[RT 227a]

Q Am I correct that your department began concentrated inspection on weights of bacon in Los Angeles County in the latter part of 1971?

A Yes.

Q And this was triggered by more than the usual number of off sale orders of bacon of various brands coming from different counties, is that true?

A Yes.

[RT 234]

Q That is exactly the point that I wanted to make.

When the inspector is weighing bacon following the Article 5 procedure he weighs the bacon and the

packaging material together and does not weigh the net contents of bacon separately from the packaging material, is that true?

A True.

Q And the way he ascertains what he believes to be the net weight of the bacon is by subtracting a certain weight attributable to the packaging materials from the overall weight which he observes?

A In the case of the tare sample size he would subtract this value from the gross weight. In the remainder of the weighings this average weight would be counterbalanced on the scale.

[RT 240]

Q The question was whether your department recognizes variations from stated net weight which has been caused by distribution practices.

A I am sorry, I can't answer that question.

Q You know of no such variation that your department recognizes, is that true?

A I know of no variation that the department has recognized.

[RT 242]

I would also like to read from the witness's deposition, page 92, lines 20 to 26:

"According to the procedures used by your inspectors if a package of bacon left Rath's plant weighing at least a pound but lost moisture during the course of distribution so that when an inspector found it it weighs somewhat less than a pound, would that be taken into consideration by the inspector when deciding whether to order it off sale?

"A Not for that purpose, no."

[RT 246]

NORMAN L. METTERT,

called as a witness on behalf of the plaintiff, under Rule 43(b), being first duly sworn, testified as follows:

THE CLERK: Please take the stand and state your true and correct name.

THE WITNESS: Norman L. Mettert, M-e-t-t-e-r-t.

\* \* \*

Q By whom are you now employed?

A Department of Weights and Measures, Los Angeles County.

\* \* \*

Q What is your present capacity?

A I am supervisor for the Compliance and Investigation Division.

[RT 268]

Q So when Inspector Livasy who wrote this report came to that point, that is Step 12, he had gone far enough to find that a shortage in that particular lot might or might not exist, are we properly following him?

A I would say probably not. That a determination should have been that there was no shortages existing.

Q Sir?

A I would say that the determination should have been that there was no shortage existing.

Q You are anticipating me. You are saying that this man ordered the material off sale erroneously?

A Yes, sir.

[RT 273]

MR. DUNLAVEY: I will offer to read from the witness's deposition, page 38, line 29 to page 39, line 1.

“Q Can you tell me specifically what changes occur in bacon between the time of packaging and the time of selling to the consumer?”

“A Well, it will continue to lose a certain amount of weight.”

[RT 274]

“Q Am I correct then that if bacon were to leave a packing plant with an average content weight of a pound a package and were to lose moisture in the course of what we will assume to be good distribution practice so that when your man gets to the counter he finds that it weighs less than a pound and should be ordered off sale in accordance with the state standards he will in fact order it off sale irrespective of the treatment it has received up to that point?”

“A That's right, sir.”

[RT 277]

“Does your department in its inspection of bacon tell the inspectors that any specific shortage below a pound will be permitted in order to compensate or allow for loss of moisture as distinguished from anything else?”

“A No, sir.”

[RT 282]

ALBERT J. PFEIFER,

called as a witness on behalf of the plaintiff, under Rule 43(b), being first duly sworn, testified as follows:

THE CLERK: Please be seated. State your true and correct name.

THE WITNESS: Albert J. Pfeifer, P-f-e-i-f-e-r.



[RT 283]

Q What is your employment at present?

A Inspector for the Department of Weights and Measures, Los Angeles County.

[RT 293-294]

MR. DUNLAVEY: I would read from page 36, lines 6 to 18:

"Q If a package of bacon labeled one pound net weight were to leave the Rath plant with an actual content weight in excess of that one pound but during the course of good distribution practice were to lose moisture so that it fell below the one pound weight it would be ordered off sale pursuant to California requirements irrespective of the fact that it had left the Rath plant in compliance with federal requirements; is that true?

"A If we found it short weight that would be correct, yes.

"Q Then when your department finds bacon short weight pursuant to California tests at the retail level your department makes no inquiry as to whether the cause of that short weight has been loss of moisture during good distribution practices?

"A No, we do not."

[RT 295]

Q When you are testing bacon for weight in the retail market the time when you require the statement on the label as to net weight to be accurate is right at the moment you are making the inspection, is that not true?

A Yes, that is true.

[RT 296]

MR. DUNLAVEY: The deposition is Rex R. Magee. The deposition is being offered as though the examination were taking place under Rule 43(b), page 3, lines 6 and 7:

"Q Would you state your full name, please.

"A Rex R. Magee."

[RT 297]

"Q By whom are you now employed?

"A The Department of Agriculture.

"Q State of California.

"A State of California."

[RT 303-304]

"Q Since we don't have the document here this morning can you tell me generally the conclusions you reached and stated in there?

"A Yes. Any lot inspected by—inspected and passed by Article 5 and then immediately inspected and passed—inspected by the federal procedures on the lot inspection basis would—there is a possibility that the federal procedure could reject a lot passed by the Article 5.

"Q Did you find any possibility that the federal could pass a lot that would be rejected by Article 5?

"A Yes. This is in the procedure where the feds have established maximum range values and thus individual errors or minus packages having established on the basis of a maximum, then Article 5 which inspects the lots and establishes the range values that are within the lot, it could be that a lot would be rejected for unreasonable errors in Article 5 and—

“Q Whereas it would have been passed by federal?

“A And passed by federal.”

Page 30, lines 11 to 18:

“Q Do I understand you correctly that if the federal inspection procedures as set forth in the manual and the California inspection procedure as set forth in Article 5 were being applied simultaneously to the same lot that in some cases they would both accept or reject, that in some other cases the federal might pass and the California would reject and in still other cases the federal might reject and the state might pass?

“A Yes.”

[RT 310]

“Am I correct that Article 5 does not contain any specific provisions as to shrinkage of bacon or any other product?

“A To the best of my knowledge it does not.”

[RT 439]

Q Am I correct that whatever deviation below stated net weight which may be permitted by California testing procedure in no way is that deviation allowed specifically for loss of moisture from the product?

A It allowed for sampling error.

Q And not for loss of moisture?

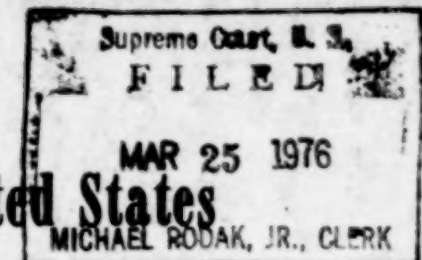
A Not to my knowledge.

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of March, A.D. 1976.

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IN THE  
**Supreme Court of the United States**



October Term, 1975  
Nos. 75-1052, 1053

L. T. WALLACE as Director of Food and Agriculture  
of the State of California and M. H. BECKER as  
Director of the County of Los Angeles, California,  
Department of Weights and Measures; and  
JOSEPH W. JONES, as Director of the County of  
Riverside, California, Department of Weights and  
Measures, *Petitioners,*

*vs.*

THE RATH PACKING COMPANY, a corporation,  
*Respondent.*

On Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit.

**BRIEF IN OPPOSITION.**

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**BRIEF IN OPPOSITION.**

---

**Opinions Below.**

The Opinion (as corrected) of the Court of Appeals for the Ninth Circuit, not yet reported, is set forth in the Appendix to Jones' petition (Jones Pet. App. 1-34).<sup>\*</sup> The Opinion of the District Court for the Central District of California (Jones Pet. App. 57-68) is reported at 357 F.Supp. 529.

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<sup>\*</sup>Citations herein to Jones' petition will be abbreviated as Jones Pet.; to Wallace's and Becker's petition, as Wall. Pet.;  
(This footnote is continued on next page)

### **Jurisdiction.**

The jurisdictional requisites are adequately set forth in Wallace's petition (Wall. Pet. 3, errata sheet).

### **Questions Presented.**

Although each of the five questions presented by petitioners (Wall. Pet. 4, Jones Pet. 4) will be responded to as a matter of completeness\*, the only questions of substance are:

1. Whether the Court of Appeals was correct in holding that the Wholesome Meat Act of 1967 precludes California from imposing (on articles prepared at Rath's establishments under inspection by the United States Department of Agriculture in accordance with the requirements under the Wholesome Meat Act) *state* labeling requirements (as to the accuracy of statements on the label as to net weight of contents) which are "in addition to and different than" *federal* labeling requirements made under the Wholesome Meat Act of 1967.

2. Whether the Court of Appeals was correct in rejecting petitioners' contention that a United States Department of Agriculture regulation (9 C.F.R. § 317.2(h)(2)) is void for vagueness because it permits "reasonable" variations from exact accuracy of labeled

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and to an Appendix, as App. Citations to the clerk's transcript and reporter's transcript in the Wallace-Becker case are C.T. and R.T., respectively; in the Jones case, J.C.T. and J.R.T. Citations to the Opinion of the Court of Appeals will be abbreviated as Opin., followed by a citation to the page in Jones Pet. App.

\*Rath will not respond to Jones' arguments about liquor prohibition and taxation, which are so irrelevant that they deserve only to be ignored—as was done by the Court of Appeals.

net weight—viz., a contention that "reasonable" is vague as to amount.

3. Whether the Court of Appeals was correct in holding that the specific California net weight labeling requirements in issue are "in addition to and different than" the net weight labeling requirements of the Wholesome Meat Act of 1967 and of regulations promulgated thereunder.

### **Constitution, Statutes and Regulations Involved.**

The pertinent constitutional provisions, statutes and regulations are:

#### **Federal**

Constitution of the United States, Article VI, Clause 2 (Wall. Pet. App. 59);

Wholesome Meat Act of 1967, 81 Stat. 584, 21 U.S.C. section 601 et seq.\* (specifically, sections 601(n), 678—Wall. Pet. App. 59-60, 65-67);

9 Code of Federal Regulations section 317.2(h)(2) (Wall. Pet. App. 67-68).

#### **California**

Business and Professions Code, section 12211 (Jones Pet. App. 69);

4 California Administrative Code, Chapter 8, subchapter 2, Article 5 (Wall. Pet. App. 97-113).

### **Statement of the Case.**

Respondent The Rath Packing Company ("Rath") cannot accept petitioners' statements of the case (which grossly deviate from the record and which understand-

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\*The constitutionality of this Act never has been drawn into question in these actions.

ably contain no citations thereto\*) or their description of the proceedings below. As will be demonstrated, petitioners' presentation is not fair to the Court of Appeals, to the District Court, to the issues or to the record.

This brief in opposition is solely by *Rath* and pertains only to the Wholesome Meat Act of 1967 and to meats and meat food products prepared under inspection by the United States Department of Agriculture ("USDA"). The Food, Drug and Cosmetic Act and the Federal Fair Packaging and Labeling Act are not in issue in the *Rath* case.\*\*

It should be emphasized at the outset that there never was any evidence in this case as to the laws of any state other than California.\*\*\* The injunction ordered by the Court of Appeals pertains only to two California statutes and two regulations thereunder, and the petitions are limited to only one of these statutes and to only one of these regulations (Wall. Pet. 4; Jones Pet. 5). Moreover, the injunction further is limited to enjoining enforcement of these state laws only as to articles prepared under the Wholesome Meat Act of 1967 and under USDA inspection pursuant thereto.

Contrary to petitioners' repeated harangue about "truth-in-packaging", "true weights", "fraud in the marketplace", etc., this is not a "consumer protection"

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\*Petitioners have taken unfair advantage of the current practice of not transmitting the record for corroboration in reviewing petitions for certiorari.

\*\*The Amici Curiae Brief of 33 States does not pertain to the *Rath* case.

\*\*\*The Amici Curiae Brief of Michigan, *et al.* deals with state laws supposedly based on a Handbook 67 (see Argument, part III, *infra*), none of which was involved in the *Rath* case.

case at all. The USDA possesses and uses ample authority to protect the consumer (21 U.S.C. §§ 672, 673), including without limitation at the retail level [R.T. 89], and petitioners' witness from the USDA (Hutchings) made it clear in one of the state court cases that the USDA does not need and has not sought any help from California in taking misbranded meat food products off sale at the retail level (App. 1-5). This simply is a test case, with Rath as the pawn, whereby California is seeking to ascertain how far it can go to extend its bureaucracy into a federal area.

Rath is an Iowa corporation, and is a meat processor engaged in interstate commerce and therefore subject to inspection pursuant to the terms of the federal Wholesome Meat Act of 1967 (the "Act") [C.T. 317-318]. Rath has been granted inspection by the USDA [C.T. 318] and USDA inspectors are assigned to the Rath establishment to enforce the Act and its regulations [R.T. 34-35]. USDA inspectors inspect the Rath establishment continuously and have access to all parts of the plant at all times [R.T. 83, 91].

Among Rath's meat food products is bacon, which is packaged in containers that are sold by retail stores [C.T. 318]. The facts of this case are limited to bacon but are equally applicable to other Rath meat food products subject to the Act [C.T. 319].

Part of the USDA inspection includes the inspection of labeled net weight of bacon before it leaves Rath's establishment [R.T. 53]. The Act contains a labeling requirement at 21 U.S.C. § 601(n)(5) which provides that:

"(n) The term 'misbranded' shall apply to any . . . meat or meat food product . . . (5) if in a . . .



package . . . unless it bears a label showing . . . (B) an accurate statement of the quantity of the contents in terms of weight . . . : *Provided*, That under clause (B) of this subparagraph (5), reasonable variations may be permitted . . . by regulations prescribed by the Secretary."

Pursuant to this statute and its proviso, Title 9 Code Federal Regulations § 317.2(h)(2) provides that:

"Reasonable variations caused by loss or gain of moisture during the course of good distribution practices or by unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large."

Hence, the federal *statute* literally requires each package of bacon to bear an accurate statement of net contents (no overpack, no underpack); however, the *regulation* relaxes this literal standard by recognizing reasonable variations from exact accuracy caused (1) by unavoidable deviations in good manufacturing practice and/or (2) by loss or gain of moisture during the course of good distribution practices.

Both of the recognized causes for reasonable variation are in accordance with reality. First, even under the best of good manufacturing practices, most packages will have some minor but unavoidable deviation from exact weight. It would be economically impossible to manufacture each package of sliced bacon with an exact weight of one pound, no more, no less—the time and cost would be prohibitive. Rath bacon in issue was packed within a pass zone of 10/16 ounce, centered upon a target or average weight as a midpoint [R.T. 138]. As of April 1, 1971, Rath's target weight

for one pound bacon was + 3/16 ounce over stated net weight; because of the off sale activities of petitioners, the target weight or overpack was changed to + 5/16 ounce on October 27, 1971, to + 7/16 ounce on January 12, 1972, and to + 12/16 ounce on March 2, 1972 [R.T. 99-101, 146-147]. These net weight compliance procedures of Rath always had full USDA approval [R.T. 52]; there was not a scintilla of evidence that Rath ever failed to follow good manufacturing practice.

Second, because of its moisture content, bacon in a nonhermetically sealed package (viz., not air tight) will lose moisture after being packaged and during the course of good distribution practices [R.T. 242, 273, 289-290]. One pound of bacon will lose approximately 1/16 ounce of moisture by evaporation between the time it is packaged and weighed and the time it leaves Rath's establishment [R.T. 133, 146, 166]. At all times, the average net weight of all bacon leaving Rath's establishment was greater than labeled net weight [R.T. 106]—viz., it was the weight of the aforesaid average overpack less the 1/16 ounce moisture loss between the time of packaging and time of leaving the establishment [R.T. 147-148].

Hence, the label of each package of bacon leaving Rath's establishment showed an accurate statement of net weight subject only to a reasonable variation caused by unavoidable deviations in good manufacturing practice. The statement in Wallace's petition (Wall. Pet. 25 fn) that packages of bacon left Rath's establishment in violation of the Act is inexcusably false—the uncontroverted evidence was that the USDA sub-area supervisor for Southern California knew of no bacon leaving the Rath establishment during the time period in issue

that was not in compliance with the labeling and net weight requirements of the Act and its regulations, and USDA records showed none [R.T. 67-69, 106]. There was no evidence that Rath had violated federal weight standards in any way (Opin., Jones Pet. App. 3).

After leaving Rath's establishment, the same one pound package of bacon will continue to lose about .3 to .4 sixteenths of an ounce of moisture per day by evaporation during the course of good distribution practice [R.T. 172-173]. Also, the wrapper of the same bacon (using a wax saturated insert board) will absorb about 5/16 ounce of moisture and grease from the bacon during such distribution [R.T. 170-172]. There was no evidence that any bacon in issue had been subjected to other than good distribution practice.

Hence, the label of each package of bacon in issue showed an accurate statement of net weight subject only to a reasonable variation caused by unavoidable deviations in good manufacturing practice and/or by loss of moisture during good distribution practice.

In the latter part of 1971 and the early part of 1972 petitioners' inspectors conducted concentrated inspections of bacon [R.T. 210-211, 227a, 248], checking not for quality or adulteration but only for the accuracy of the statement of net weight on the label [R.T. 209]. The accuracy was checked by a weighing procedure for determining net weight set forth in Title 4, California Administrative Code, Chapter 8, subchapter 2, Article 5 (Wall. Pet. App. 97-113), as supposedly authorized by Business and Professions Code § 12211 (Jones Pet. App. 69), which actually is a procedure intended to result in a "statistical estimation" of the *average* net weight of a number or "lot"

of packages at the time of inspection—generally applied by the inspectors at the retail store [C.T. 318-319; R.T. 212, 215-216, 295, 316].\* Article 5 makes no distinction between products that lose moisture and those that do not; nor does it make provision for any weight variations caused either by unavoidable deviations in good manufacturing practice or by loss of moisture during good distribution practice (Opin., Jones Pet. App. 6). As conceded in Wallace's petition (Wall. Pet. 5, 12), the California standard was "accurate-weight-on-the-average at retail".

If the inspector estimated that the average net weight of the lot was "short weight" even by as little as 1/16 ounce (less than 1/2 of 1%), all packages in the lot (including exact weight and overweight packages\*\*—J.C.T. 73, 75) were ordered off sale—with no consideration as to the cause of the short weight [R.T. 216, 237] and with no recognition whatsoever of any reasonable variation as required by the federal regulation (Opin., Jones Pet. App. 6). No consideration was given to whether the packages had left Rath's plant in compliance with the Act or with an average net weight equal to labeled net weight [R.T. 218], nor to the kind of distribution practice that the bacon had been subjected to after leaving Rath's plant [R.T. 216-217], nor to whether the short weight was the result of loss of moisture during the course of good

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\*Although the Opinion of the Court of Appeals discusses two statutes (§§ 12211, 12607) and two regulations (Articles 5, 5.1), the petitions (and hence this brief in opposition) are confined to § 12211 and Article 5.

\*\*The Amici Curiae Brief of 33 States, at p. 14, argues that off sale activity which includes overweight packages "is hardly prudent or sensible. It does not help consumers and is expensive for packagers".



distribution practice [R.T. 218-219, 240, 274, 293-294, 310]—and yet loss of moisture by evaporation during the course of distribution was a primary reason why petitioners (using the California weighing procedure) found short weight in Rath's bacon at retail [R.T. 185]. Any bacon ordered off sale was thereby effectively a total loss to Rath [R.T. 142, 110, 102].

Even the USDA weighing procedure for net weight determination is different from the California weighing procedure and, whether the two procedures are applied to the same bacon simultaneously or at different times, the differences between the two procedures can lead to a different conclusion as to whether the bacon is accurately labeled [R.T. 180-181, 184-185, 304, 427, 429-430]. The USDA procedure for net weight determination is to subtract from gross package weight the weight of a dry wrapper ("dry tare") [R.T. 86-87, 173-174]. In contrast, the California procedure for net weight determination is to subtract from gross package weight not only the weight of the dry wrapper but also the weight of the moisture and grease absorbed into or retained on the wrapper ("wet tare") [R.T. 174, 234]. The California procedure of subtracting the wet tare leads to a net weight determination for a pound of bacon of approximately 5/16 ounce less than the USDA procedure using the dry tare [R.T. 176, 425]. The average "short weight" for which Becker ordered Rath's bacon off sale was 4/16 ounce [R.T. 181-182], which is less than the net weight difference resulting from the difference in weighing procedures alone.

The Court of Appeals held that application of the California requirements to Rath's meat food products should be enjoined. First, the Act (21 U.S.C. § 678) expressly ordains that no state can impose a labeling requirement which is in addition to or different than the federal labeling requirements; second, the federal regulations include a valid labeling requirement that reasonable variation from accurate weight be recognized when caused by unavoidable deviations in good manufacturing practice and/or by loss of moisture in the course of good distribution practice; third, both the District Court and the Court of Appeals found, as a factual determination, that the California labeling requirements are in addition to and different from the federal labeling requirements.



## ARGUMENT.

### I

#### The Decision Below Is Clearly Correct.

- a. **The Wholesome Meat Act of 1967 Preempts and Precludes California From Imposing State Labeling Requirements That Are Different From Federal Labeling Requirements.**

The Act, 21 U.S.C. § 678, expressly preempts the imposition of labeling requirements (*i.e.*, label statements of net weight) by providing that:

“Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State. . . .”

The validity of this express “clear and complete” preemptive provision of 21 U.S.C. §678 heretofore has been upheld by the Sixth Circuit in *Armour and Company v. Ball*, 468 F.2d 76, 85 (6th Cir. 1972), cert. den. 411 U.S. 981 (1973). In fact, petitioner Jones concedes preemption [J.C.T. 83; J.R.T. 26, 29-31].

Since the Act literally defines “misbranded” as a term describing the failure to meet the Act’s labeling requirement of showing a statement of net weight that is accurate (21 U.S.C. § 601(n)(5)) subject to reasonable variation from two specified causes (9 C.F.R. § 317.2(h)(2)), the courts below correctly held that the express federal preemption of labeling requirements included a preemption of defining what is misbranded (Opin., Jones Pet. App. 28fn). The district court put it about as succinctly as possible: “Common sense tells us that mislabeling and misbranding are synonymous terms.” (357 F.Supp. 529, 535).

Although the Act, 21 U.S.C. § 678, allows the states to “exercise concurrent jurisdiction with the Secre-

tary . . . for the purpose of preventing the distribution . . . of any such articles which are . . . *misbranded* and are outside of [the packing plant]. . . .”, the article must be “misbranded” within the definition of the Act. Hence, if California elects to exercise such “concurrent jurisdiction” with the Secretary to prevent distribution of a “misbranded” article, California must use the same standard of “misbranded” as does the Secretary. In short, California’s concurrent jurisdiction is limited to preventing the distribution of meat food products which are “misbranded” as that term is defined by the Act; California cannot impose a labeling requirement which is different from the labeling requirements of the Act by imposing a definition of “misbranded” which is different from the definition of the Act—yet, this is exactly what California’s § 12211 and California’s Article 5 do and that is why the courts below have enjoined their application (Opin., Jones Pet. App. 28-29).

In a case of express preemption such as set forth in 21 U.S.C. § 678, there is no need to find that the state system stands in opposition to the federal.

“When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go. . . . The legislation is not saved by calling it an exercise of the police power. . . .”

*Charleston v. W.C.R. Co. v. Varnville Furniture Co.*, 237 U.S. 597, 604.

Even so, opposition in this case is clear—the state is ordering articles off sale even though the articles comply with the Act.

**b. Federal Labeling Requirements Include Recognition of Reasonable Variations Arising From Two Specific Causes.**

The only ground ever argued by petitioners for invalidity of the federal "reasonable variation" regulation (which recognizes reasonable variations caused (1) by unavoidable deviations in good manufacturing practice and/or (2) by loss of moisture during the course of good distribution practices) was that the term "reasonable" made the regulation void for vagueness. As the Court of Appeals aptly pointed out, the test of being "reasonable" is too well established in the law to be challenged now (Opin., Jones Pet. App. 20-22). Moreover, there is something inherently wrong in a state arguing that a federal law is vague as to the amount of protection to be provided to a citizen, and hence that the law is void and that the citizen should get no protection at all!

No evidence was offered by any petitioner as to why the well recognized and long-standing standard of "reasonable" was vague or could be replaced by a more accurately defined limit. Although petitioners now try to convince this Court that the regulation imposes such an inordinate hardship in their inspection activities, it is remarkable that they did not challenge it or contend it to be void for vagueness until the district court judge suggested the issue after the close of evidence (Opin., Jones Pet. App. 18). In fact, counsel for petitioner Jones told the district court, "Well, we don't challenge the validity of (h)(2) . . . Frankly, I hadn't considered whether it is valid or not. . . ." [J.R.T. 49].

Not only is the recognition of reasonable variation sensible to the point of being essential, but moreover

the concept of federal statutes permitting the recognition of reasonable variations by regulation, and of regulations so providing, has existed for over half a century. The Federal Food and Drug Act of 1906 as amended in 1913 (34 Stat. 768, 37 Stat. 732) provided:

"that an article of food shall be deemed to be misbranded—

\* \* \*

"Third. If in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count: Provided, however, That reasonable variations shall be permitted . . . by rules and regulations made in accordance with the provision of § 3 of this Act."

Under this statute, and the authority conferred therein, federal regulations were adopted in 1914 [Reg. 29, 5/11/1914, C.T. 887] which said:

"(i) The following tolerances and variations from the quantity of the contents marked on the package shall be allowed:

"(1) Discrepancies due exclusively to errors in weighing, measuring, or counting which occur in packing conducted in compliance with good commercial practice.

\* \* \*

"(3) Discrepancies in weight or measure, due exclusively to difference in atmospheric conditions in various places, and which unavoidably result from the ordinary and customary exposure of the packages to evaporation or to the absorption of water.



"Discrepancies under classes (1) and (2) of this paragraph shall be as often above as below the marked quantity. The reasonableness of discrepancies under class (3) of this paragraph will be determined on the facts in each case."

In 1932, in *United States v. Shreveport Grain & E. Co.*, 287 U.S. 77 (1932), the United States Supreme Court upheld the validity of the "reasonable" variation provisions of the Food and Drug Act, as amended in 1913, and its regulations of 1914. The court held (1) that the statute properly gave "administrative authority to the Secretaries of the Treasury, Agriculture, Commerce and Labor to make rules and regulations permitting reasonable variations from the hard and fast rule of the act", and (2) that the regulations properly provided for reasonable variations (with no more exact tolerance being specified) caused by errors in weighing which occur in good commercial packing practice or from loss of moisture during distribution. The court said, "These regulations, which cover variations . . ., have been in force for a period of more than eighteen years, with the silent acquiescence of Congress."

On July 12, 1933, only seven months after the *Shreveport* decision, a bill was introduced in Congress to revise the Food and Drug Act completely, but the requirement pertaining to labeling of contents was proposed to be reenacted in substantially the same form as in the 1913 amendment (See C. Dunn, *Federal Food, Drug, and Cosmetic Act*, 29, 39 (1938)). Through the following five years of legislative hearings and revisions, during which time the bill was extensively debated and studied, the language of the weight-labeling

requirement remained unchanged until it was enacted in 1938 (52 Stat. 1040). The reason for relatively little change from the 1913 amendment was the intention to carry over the same law. W. A. Campbell, Chief of the Food and Drug Administration, testified before the Senate Commerce Committee that the proposed revision was "the language of the law at the present time." *Hearings on S.2800*, 73d Cong., 2d Sess. (1934) in C. Dunn, *supra*, at 1166. The committee report subsequently noted that the labeling requirement in the bill "merely repeats the provisions of the present law." S.Rep.No. 361, 74th Cong., 1st Sess. (1935) in C. Dunn, *supra*, at 245.

The current Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 301 *et seq.*), as enacted in 1938 and subsequently amended, requires that labels of foods covered by that act shall bear "an accurate statement of the quantity of the contents in terms of weight . . . : *Provided*, That . . . reasonable variations shall be permitted . . . by regulations prescribed by the Secretary." (21 U.S.C. § 343(e)). The current federal Fair Packaging and Labeling Act (15 U.S.C. § 1451 *et seq.*), as enacted in 1966 and subsequently amended, is to the same effect (15 U.S.C. §§ 1453, 1460). And the federal regulations promulgated under both of these acts, at 21 C.F.R. § 1.8b(q), provide that "Reasonable variations caused by loss or gain of moisture during the course of good distribution practice or by unavoidable deviations in good manufacturing practice will be recognized."\*

\*The United States Department of Justice filed with the Court of Appeals a "Brief of the United States as Amicus Curiae" in the consolidated case of *Jones v. General Mills, Inc., et al.* This brief argued *inter alia* for the validity of 21 C.F.R. §§ 1.8b(q)—and the reasoning is sufficiently applicable to 9 C.F.R. § 317.2(h)(2) that said brief is reproduced in the Appendix hereto—App. 6-25.



In 1967 Congress passed the federal Wholesome Meat Act of 1967. And in the regulations at 9 C.F.R. § 317.2(h)(2), following the pattern set by over a half century of federal laws and court decisions, the Secretary adopted the same reasonable variation regulation as already had been adopted in 21 C.F.R. § 1.8b(q).

The long-standing existence of "reasonable variation" regulations and the reenactment by Congress of the net weight labeling provisions of the Federal Food, Drug, and Cosmetic Act in 1938 (and enactment of the federal Fair Packaging and Labeling Act (1966) and of the Wholesome Meat Act of 1967), in essentially the same form as reviewed in *United States v. Shreveport Grain & E. Co.*, 287 U.S. 77 (1932), are highly indicative of validity.

When Congress reenacts a statute in substantially the same form, it is presumed to have adopted any prior judicial construction of the language (*Shapiro v. United States*, 335 U.S. 1, 16 (1948); *Dragor Shipping Corp. v. Union Tank Car Co.*, 371 F.2d 722, 726 (9th Cir. 1967)), and administrative interpretations of the prior statute also are deemed to have received congressional approval and to have the effect of law (*Commissioner v. Noel Estate*, 380 U.S. 678, 682 (1965); *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U.S. 110, 114-115 (1939); *NLRB v. Brooks*, 204 F.2d 899, 905 (9th Cir. 1953), *aff'd* 348 U.S. 96 (1954)).

**c. California Labeling Requirements Are Different From Federal Labeling Requirements.**

Both the Court of Appeals and the District Court found as a fact that California's net weight labeling requirements are different from federal net weight labeling requirements (Opin., Jones Pet. App. 6, 67).\*

California's labeling requirement is of accurate-weight-on-the-average; the federal statutory requirement (sans regulation) is accurate weight as to each package—no averaging. Hence, California's requirement is different from the federal requirement if only the federal statute is considered.

Both the Court of Appeals and the District Court found that California's labeling requirements contain no provision for recognition of reasonable variation caused either by unavoidable deviations in good manufacturing practice or by loss of moisture during the course of good distribution practice (Opin., Jones Pet. App. 6, 28); the federal regulation requires such recognition. Hence, California's requirement is different from the federal requirement if the federal regulation is considered along with the federal statute.

Finally, both the Court of Appeals and the District Court found that "the California inspectors employed a different weighing method" than the federal weighing method (Opin., Jones Pet. App. 4), this difference alone accounting for more supposed short weight than the average short weight alleged to exist by petitioners.

The difference between California law and the Wholesome Meat Act of 1967 is readily understandable.

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\*Petitioners recently filed an affidavit with the Court of Appeals conceding that California inspectors could not "enforce the weights and measures laws of California" if they are required to recognize the "standard" of 9 C.F.R. § 317.2(h)(2).

California's laws (§ 12211 and Article 5) antedate the Act and thus never were intended to comply with it. California's laws are applied across-the-board to every commodity that is inspected (Wall. Pet. 5)—it is not surprising that California laws designed for counting pills in a bottle or pins in a box, or for weighing applesauce in a sealed can, are different from a federal net weight labeling law which is specifically intended to recognize the unique problems encountered in manufacturing and distributing meats and meat food products that are pre-packaged in non-hermetically sealed packages.

**d. Summary.**

The Act expressly preempts and precludes California from imposing different labeling requirements. California's labeling requirements are different—hence, the courts have enforced the Act by enjoining imposition of California's different requirements. It is as simple as that. If California wants to enact and enforce requirements that are not different, it is free to do so (Opin., Jones Pet. App. 29).

Unless bacon is to be packaged in a hermetically sealed container, the bacon will lose moisture (and weight) from the day it is sliced and packaged (the mandatory use of a more expensive hermetically sealed container to prevent the loss of non-nutritional moisture is not in the consumer's interest). Petitioners argue that the bacon must weigh labeled net weight on the day it is purchased by the consumer, however long this may be after manufacture. This means it must be overpacked when leaving the establishment—but not even petitioners know by how much because no one knows how long it will be before the bacon

is sold [C.T. 184-185]. However, whatever the overpack selected by any individual packer, the customer would pay more for it—no lawsuit is going to furnish the consumer something for nothing. As discussed more fully in the Amicus Curiae brief filed below on behalf of the United States by the Department of Justice, this alternative of indefinite and voluntarily selected overpacks has the disadvantage for the consumer that he no longer can accurately compare price with weight, from brand to brand, because the overpacks will not be uniform among brands (App. 18-21).

On the other hand, if all bacon is subjected to the same federal net weight label requirements when it leaves the establishment (which is the last time the packer can control it), then every customer will get the same amount of nutritional substance when the bacon is purchased—the only weight difference will be due to non-nutritional moisture loss. This alternative, selected by Congress, promotes certainty and uniformity.

**II**

**There Is No Conflict of Decision.**

The decision below holds that the Act preempts “marking, labeling, packaging [and] ingredient requirements” because “Congress has unmistakably so ordained” (Opin., Jones Pet. App. 26-27).

The Sixth Circuit heretofore likewise has held that the Act preempts “marking, labeling, packaging [and] ingredient requirements”:

“ . . . in view of the clear and complete preemption ordained by Congress, this Court must enforce the Supremacy Clause and declare that



the Federal Act preempts certain provisions of the Michigan Law.”

*Armour and Company v. Ball*, 468 F.2d 76, 85 (6th Cir. 1972), *cert. den.* 411 U.S. 981 (1973).

This preemption precludes the imposition of any labeling requirements which are “in addition to, or different than those made under” the Act (21 U.S.C. § 678).

The decision below does not deal with the same matter that was involved in the Second Circuit affirmance (without any opinion) of *General Mills, Inc., et al. v. Furness*, 398 F.Supp. 151 (S.D.N.Y. 1974), *aff’d* 508 F.2d 836 (2d Cir. 1975) (Jones Pet. App. 95-109), and is not contrary to any principle thereof. First, *Furness* did not deal with the Wholesome Meat Act of 1967 and never considered the express preemption clause of 21 U.S.C. § 678. As Jones says, “Section 678 has no counterpart in the Federal Food, Drug and Cosmetic Act” (Jones Pet. 19).

Second, the district court in *Furness* observed that “Both the city ordinance and federal regulation permit reasonable variations caused by loss of moisture during the course of good distribution practice.” (Jones Pet. App. 97, 105-106); and held that the federal action was premature because the city ordinance imposed no penalty until and unless a state court action was filed wherein the manufacturer could attempt to justify such variations even greater in amount than allowed by the inspector, and such state court action had not yet been filed (Jones Pet. App. 108). California labeling requirements, in marked contrast, recognize absolutely no such variation whatsoever.

The point that petitioners refuse to understand is that the preemption is as to state imposition of labeling requirements that are *different* from federal labeling requirements. The court in *Furness* felt that there had not been proof of a difference between New York City and federal requirements; the difference between California and federal requirements is uncontroverted.

### III

#### **There Is No Important Question of Federal Law.**

The Opinion below pertains to only two California statutes and to only two California regulations thereunder—and then only to their application to meat food products previously inspected as to net weight by the USDA. No other state has been alleged or shown to have either the same or similar labeling requirements as California. It is a fact that California’s Article 5 is not employed by any other state!

Petitioners misstate that California’s labeling requirements, similar requirements of other states and Handbook 67 “preserve the single national standard of accuracy” (Jones Pet. 8-12, 21-23). There was not a scintilla of evidence to justify this statement or the arguments associated with it. There was no evidence whatsoever as to the laws of any state other than California—viz., no evidence to justify petitioners’ wholly unfounded arguments based on supposed “present state laws which require a uniform standard of accuracy” (Wall. Pet. 15-16). To the contrary, it is the federal Act which Congress intends shall create a “uniform national labeling standard” (Opin., Jones Pet. App. 27).



Handbook 67 is wholly irrelevant, although it is the basis upon which other states have lent their support to the petitions for certiorari—Handbook 67 was never in issue nor in evidence (neither was any Model State Weights and Measures Law). Moreover, Handbook 67 is materially different from California's requirements, *i.e.*:

Handbook 67 recognizes net weight variations caused by moisture loss occurring during the course of good distribution practices (App. 27-28; Model State Packaging and Labeling Regulation 1975, App. 37-38). In fact, the author of Handbook 67 testified before the district court in *Furness* that proper application of Handbook 67 recognizes variations from moisture loss as *additional* to the variations allowed by the "Unreasonable Minus or Plus Errors" tabulation in the Handbook (App. 31-36). In contrast, California does not recognize variations caused by moisture loss at all. California admits that its laws are not designed to "determine the *cause* of a discrepancy from label weight" (Amici Curiae Brief of 33 States, p. 15).

Handbook 67 recognizes that "greater liberality" must be exercised in determining the reasonableness of variations caused by good manufacturing practice in "packages containing large individual elements", such as slices of bacon (App. 29-30). California does not; California actually complains about the fact "that the federal standard must vary depending upon the product involved" (Jones Pet. 21).

Handbook 67 recognizes that "the experience and judgment of the inspector must be relied upon" in "the building up of a working knowledge as

to . . . what may be considered to be 'good distribution practice' with respect to the packages of an individual commodity that may gain or lose weight through gain or loss of moisture" (App. 27-28). California, to the contrary, concedes that it is "impossible" for an inspector enforcing California laws to determine the cause of a net weight variation or to determine whether it is reasonable (Amici Curiae Brief of 33 States, p. 16).

Considering such differences between Handbook 67 and Article 5, it is inexcusable for petitioners to represent that "The methods employed under Article 5 and Handbook 67 preserve the single national standard of accuracy. . . ." (Jones Pet. 23).

The Opinion of the Court of Appeals turns upon its own facts and solely upon California law. The laws of other states, and the procedures used in enforcing them, would not be reached in any review of the Opinion.

#### IV

##### **There Is No Jurisdictional Question.**

The supposed jurisdictional question raised by petitioner Wallace (Wall. Pet. 20-24) evaporates under an accurate presentation of the facts.

On February 17, 1972 and March 1, 1972, respectively, the district attorneys for Riverside and Los Angeles counties filed separate actions in the name of The People of the State of California against Rath in their respective county superior courts. These complaints did not involve any petitioner herein, nor the issue of off sale orders, nor federal law, nor any statute or regulation now in issue. These actions sought

money and injunctive relief for alleged violation of California Business and Professions Code § 17500, Health and Safety Code § 26550 and Civil Code § 3369 (Jones Pet. App. 7, Wall. Pet. 6fn). Rath removed both actions to the district court on grounds of diversity, whereupon each was promptly remanded for lack of diversity in that The People of the State of California are not deemed citizens of any state for diversity purposes. The remand order specifically noted the absence of any federal question on the face of the pleadings.

On March 17, 1972 (prior to filing any pleading in either state court action) Rath commenced the two actions at bench by filing complaints in the federal district court against Jones and Becker, as directors of the departments of weights and measures of Riverside and Los Angeles counties, respectively. These actions sought to enjoin off sale activity. Jurisdiction was based on 28 U.S.C. § 1331(a). Contrary to petitioners' misstatements (Wall. Pet. 7-8), these actions were the *first* to challenge the legality of each petitioner's off sale orders of Rath's meat food products and were the *first* to involve California Business and Professions Code § 12211 and Title 4, California Administrative Code, Chapter 8, subchapter 2, Article 5. Petitioner Becker was served March 20, 1972.

These federal actions were not a "defense" to the state actions, as manifested by the fact that the Los Angeles County action has gone to trial (Rath prevailed) and the Riverside County action currently is

awaiting trial.\* Moreover, petitioners fail to state that the pre-trial conference order in the district court specifically provided that "There is no issue in this action related to Health and Safety Code § 26550, Business and Professions Code § 17500 or Civil Code § 3369" [C.T. 324]—which were the only statutes involved in the state court complaints.

Hence, the federal district court was first to acquire jurisdiction of the controversy as to the off sale activity under section 12211 and Article 5, upon which the petitions for certiorari are based (Opin., Jones Pet. App. 16). The application of the law as to jurisdiction based on these facts is well set forth in the Opinion of the Court of Appeals and will not be repeated here (Opin., Jones Pet. App. 9-18).

## V

### **There Is No Question of Unclean Hands.**

Petitioner Wallace argues that Rath had unclean hands because packages of bacon allegedly were short weight in violation of 21 U.S.C. § 607(b) at the time of shipment from Rath's plant (Wall. Pet. 24-25). The argument is false and unconscionable. As the Court of Appeals and the District Court both found, "There is no evidence that Rath has violated federal weight standards in any way." (Opin., Jones Pet. App. 3). Every Rath package complied with federal

\*California appellate courts, reviewing preliminary proceedings in each state action, have paid no heed to petitioners' arguments against priority of the federal actions (*People v. Rath Packing Co.*, 44 Cal.App. 3d 56, 60 (1974); *Christensen v. Superior Court*, 32 Cal.App. 3d 749, 754 (1973)).

law and USDA requirements [R.T. 67-69, 106] and each of the three courts which has decided the issue has held that there was no false labeling.

**Conclusion.**

Congress has recognized the practical obstacles to requiring absolute true net weight of moisture bearing foods at retail, and has legislated accordingly. So long as all packers are held to the same standard, neither Rath nor any other packer has an advantage over competitors—and the consumer is fully protected. Whether petitioners agree with Congress really is irrelevant.

For each of the reasons set forth herein, it is respectfully submitted that the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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*Attorneys for Respondent*  
*The Rath Packing Company.*

# APPENDIX



1 MR. DUNLAVY: Your Honor, could I ask that question be  
2 read?

3 THE COURT: Surely.

4 (Question read.)

5 THE WITNESS: No.

6 MR. GRAHAM: Nothing further.

7 MR. GOODMAN: No questions, your Honor.

8  
9 CROSS EXAMINATION

10 BY MR. DUNLAVEY:

11 Q Mr. Hutchings, you undoubtedly are aware of the  
12 provisions of the Wholesome Meat Act of 1967, are you not?

13 A Yes, sir.

14 Q And since you are on the compliance staff you are  
15 probably particularly familiar with those sections of the  
16 Act that have to do with enforcement concerning misbranding;  
17 would that not be true?

18 A That's correct.

19 THE COURT: I did not hear that last.

20 MR. DUNLAVEY: The question was whether he was not  
21 particularly familiar with those portions of the Federal Act  
22 that have to do with the enforcement of misbranding.

23 THE COURT: Oh, misbranding is the word I did not get.  
24 All right. Fine.

25 Q BY MR. DUNLAVEY: When I said "misbranding", you  
26 understood it to include the question of whether the label is  
27 right as to the weight of contents, did you not?

28 A That is correct.

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Q You are aware, I think, as you said, that your department and, apparently, you have the power to detain meat at the retail level if you find it to weigh less than the labeled net weight; is that not true?

A That is correct.

Q And your department -- and, apparently, you have the power to condemn that meat: is that not the case?

MR. GRAHAM: What does counsel mean by "condemn"?

MR. DUNLAVEY: It is a statutory word.

Q Do you know what it means?

A Yes. It means within meat inspection, yes. Now, wait a minute. I did not answer your question yes. Your question, we do not have the power to condemn a product.

Q What do you do with it after you detain it?

A There are three alternatives that are given to the persons that own that product. First alternative is to bring about voluntary compliance, whatever the problem is, if they will take care of it themselves.

Second alternative is voluntary condemnation by the owner of that product, not by USDA, but by them, and third alternative is litigation in the courts and the courts make a decision what will be done with the product.

Q And that would be Federal Court, wouldn't it?

A Yes, sir, sure would.

Q Now, whether you are going to take that kind of action, apparently, depends upon your evaluation of information that you receive; is that a correct understanding?

A That is correct.

Q And I gather you will take that information from wherever it comes, whether it be a government agency or a consumer, any source at all; is that not true?

A That is correct.

Q And you say you rely upon that information; do I infer correctly that you evaluate it, decide whether it is right or wrong, decide how important it is and then you either conclude to go ahead and detain or to pass it?

A That is correct.

Q Am I correct that from 1971 to the present time you have never detained any Rath product?

MR. GRAHAM: Objection.

THE COURT: Overruled.

THE WITNESS: I can't honestly answer your question because I would have to go to our records to determine that. You got to remember that we detain something like about nine and a half million pounds of products in the Western area and I have other people that work for me and I really couldn't answer that honestly.

Q All right. I will take your personal knowledge. You have testified twice in this matter. Do you have any personal knowledge of any Rath product ever having been detained by your department from 1971, 1972, 1973?

A To my knowledge, no.

Q Have you been authorized by your department to appear here as a witness today?

A Yes, sir.

Q Is it your intention to testify to this Court that

1 your United States Department of Agriculture does not have enough  
2 personnel in order to do the job that is allotted to it by  
3 statute?

4 MR. GRAHAM: Objection.

5 THE COURT: Overruled.

6 THE WITNESS: It is my intention to tell the facts, sir,  
7 whether I have enough personnel or not, I don't believe,  
8 really, enters into it.

9 Q BY MR. DUNLAVEY: Is it your testimony your depart-  
10 ment has more authority than it has more manpower to enforce?

11 MR. GOODWIN: Objection. Argumentative.

12 THE COURT: Overruled.

13 MR. GRAHAM: I would object that it is irrelevant. We  
14 are talking about the effect of their reliance on state and  
15 local weights and measures officials and other enforcement  
16 agencies, not whether they have sufficient number of personnel.

17 THE COURT: You may answer it.

18 THE WITNESS: It is certainly true that we have plenty  
19 of work to do and we could use many more employees. There is  
20 no doubt about it. But we feel -- however, don't let the small  
21 numbers influence you because, again, we do use many other  
22 agencies, many other people to get our job done and it may go  
23 to Fish & Game people. It may go to State Weights & Measures.  
24 It may go to many people, so, just because we have a small  
25 number of people does not mean we can't get the job done.

26 Q BY MR. DUNLAVEY: Somehow or other, I gather, last  
27 year you got 8,000,000 pounds of meat products remedied some-  
28 how or other?

1 A That is correct.

2 Q And, to the best of your knowledge, there wasn't  
3 one pound of Rath meat in it?

4 A To my knowledge, yes.

5 MR. DUNLAVEY: No other questions, your Honor.

6  
7 REDIRECT EXAMINATION

8 BY MR. GRAHAM:

9 Q Do you ever ask Weights & Measures officials to  
10 order meat products off sale?

11 A I don't think order is a proper word. We work in  
12 conjunction with other compliance staffs within other states  
13 and we do advise them at times what our opinion would be and  
14 what our action would be under similar circumstances.

15 Q Do you request they order products off sale?

16 A We do have the delegation to state agencies to  
17 remove products and we have done this, yes.

18 Q Do you ever ask state officials -- state or  
19 county -- State of California Weights & Measures officials to  
20 inspect meat at the retail level for weight?

21 A To my knowledge, we haven't done that at this  
22 point.

23 MR. GRAHAM: Thank you.

24 THE COURT: Fine. Thank you, Mr. Hutchings.

25 MR. GRAHAM: I would like to call to the stand Mr.  
26 Becker please.  
27  
28



UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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No. 74-1051  
No. 73-3583

---

GENERAL MILLS, INC., a corporation; THE PILLSBURY COMPANY,  
a corporation; SEABOARD ALLIED MILLING CORPORATION, a  
corporation,

Appellants,

v.

JOSEPH W. JONES, as Director of the County of Riverside  
Department of Weight and Measures,

Appellee.

Appeal From The United States District Court  
For The Central District Of California

---

BRIEF OF THE UNITED STATES AS AMICUS CURIAE

---

Respectfully submitted,

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BRIEF OF THE UNITED STATES AS AMICUS CURIAE

---

ISSUE PRESENTED

Whether 21 CFR 1.8b(q) is valid.

STATEMENT OF THE CASE

This case is as an action for declaratory relief by General Mills, Pillsbury, and Seaboard Allied Milling, three wheat flour manufacturers, against the director of the California County of Riverside Department of Weights and Measures. The action was precipitated when the county, acting under a state statutory procedure, ordered "off sale" flour packages it determined to be unlawfully underweight. The milling companies sought a declaratory

judgment that the imposition of the state weight law on their products was unlawful and an injunction restraining the county officials from enforcing the state law against their products. Although the millers attacked the county's actions on numerous grounds, the court properly perceived that the only genuine issue was an apparent conflict between state and Federal law.

The pertinent Federal statute is 21 U.S.C. 343, which states:

A food shall be deemed to be misbranded -

\* \* \*

(e) If in package form unless it bears a label containing (1) the name and place of business of the manufacturer, packer, or distributor; and (2) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count: Provided, That under clause (2) of this paragraph reasonable variations shall be permitted, and exemptions as to small packages shall be established, by regulations prescribed by the Secretary.

\* \* \*

Pursuant to the proviso in that statute, the following regulation, 21 CFR 1.8b(q), was issued to describe the "reasonable variations" mentioned in the proviso:

The declaration of net quantity of contents shall express an accurate statement of the quantity of contents of the package. Reasonable variations caused by loss or gain of moisture during the course of good distribution practice or by unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large.

California has a more complicated statutory scheme for regulating the labeling of packages as to the weight of their contents. Section 26551 of the Health and Safety Code is essentially identical to 21 U.S.C. 343(e).

In addition to that requirement, however, section 12607 of the Business and Professions Code requires that the net weight appear on the package; no mention of variations is made. Section 12211 of the Business and Professions Code, which establishes the authority to order products off sale, declares that the "average weight" of packages must equal the stated weight, thus by implication permitting certain variations.

The apparent Federal-State conflict, then, is in the type of variations permitted. While the Federal regulation recognizes variations arising from two sources, California's average-weight provision is equivalent only to the Federal recognition of "unavoidable deviations in good manufacturing practice." The other type of variation recognized in the Federal regulation, loss or gain of moisture, has no counterpart in the California statutes. Since flour gains or loses moisture depending on its conditions of storage, and the flour ordered off sale preceding this case was apparently less than stated weight because of moisture loss, the question arises as to which standards govern.

The district court in this case, while holding that Federal standards governed, ruled that Federal standards did not allow variations from stated weight. It reached that conclusion by stating that the case was governed by the principles it announced in Rath Packing Co. v. Becker, 357 F. Supp. 529 (C.D. Cal., 1973), and consequently, that 21 CFR 1.8b(q) was invalid for its failure to define "reasonable variations" with sufficient explicitness. The court further held that in the absence of a valid regulation, the absolute requirement for accurate labeling in 21 U.S.C. 343(e)(2) was the only law applicable. It therefore found the state statutes inconsistent and enjoined their enforcement against products also subject to the Federal Food, Drug, and Cosmetic Act.

Thus, the result of this case is that a Federal regulation that is an important part of the labeling standards has been declared invalid for vagueness, while at the same time Federal statutory standards have been held to be the only operative law. Because California has read the court's opinion as requiring labeling of minimum weight, rather than the accurate weight Federal law requires, the confusion of this situation has been compounded, leaving the law of weight labeling in California in complete disarray. It is important to clarify what the Federal law is if this important regulatory program is to be continued.

ARGUMENT

I. THE REGULATION IS ENTIRELY  
CONSISTENT WITH THE STATUTE  
AND IS THEREFORE VALID.

The regulation in this case is not challenged as unconstitutional. Thus, it is invalid only if it is unreasonable or inconsistent with the statute authorizing it to be issued. See, e.g., Commissioner v. South Texas Lumber Co., 333 U.S. 496, 501 (1948); United States v. Morehead, 243 U.S. 607, 614 (1917); Review Committee v. Willey, 275 F.2d 264, 272 (C.A. 8, 1960); United States v. Obermeier, 186 F.2d 243, 247 (C.A. 2, 1950).

A. The Statute Requires Only  
That the Regulation Be a  
Statement of Enforcement  
Policy

The statutory provision in question, 21 U.S.C. 343(e), had its origin in a 1913 amendment to the 1906 Federal Food and Drugs Act (34 Stat. 768). Section 8 of the original Act required that any labeling statement as to weight be correct, but there was no requirement that a statement of the

weight of the contents be made. In 1913 Congress remedied this deficiency by requiring a statement of weight, and through a proviso, sought also to take account of industrial practicalities (37 Stat. 732). As the committees of Congress saw the amendment,

Under the terms of the bill reasonable variations are permitted, whether tolerances are or are not established by the rules and regulations, nor will the tolerances established by the rules and regulations be conclusive upon the courts in determining the question of the reasonableness of the variations, but the establishment of tolerances by rules and regulations will undoubtedly be a great aid to the producers of food products in package form by letting them know in advance what the Government officials believe to be reasonable variations. The establishment of tolerances will also be a great aid to the officials both of the General Government and to the law. S. Rep. No. 1216, 62nd Cong., 3d Sess. (1913) at 3; H.R. Rep. No. 850, 62nd Cong., 2d Sess. (1912) at 3.

In United States v. Shreveport Grain & Elevator Co., 287 U.S. 77 (1932), the Supreme Court ruled, however, that the committees' intentions had not been successfully carried out by the language of the statute. In answer to the argument that the statute was void because it substantively prohibited unreasonable variations, the Court held that the reference to variations was not part of the offense described:

The substantive requirement is that the quantity of the contents shall be plainly and conspicuously marked in terms of weight, etc. We construe the proviso simply as giving administrative authority to the Secretaries of the Treasury, Agriculture, Commerce, and Labor to make rules and regulations permitting reasonable variations from the hard and fast rule of the act and establishing tolerances and exemptions as to small packages ...



...  
The effect of the provision assailed is to define an offense, but with directions to those charged with the administration of the act to make supplementary rules and regulations allowing reasonable variations, tolerances, and exemptions, which, because of their variety and need of detailed statement, it was impracticable for Congress to prescribe. The effect of the proviso is evident and legitimate, namely, to prevent the embarrassment and hardship which might result from a too literal and minute enforcement of the act, without at the same time offending against its purposes.

On July 12, 1933, only seven months after the Shreveport decision, a bill was introduced in Congress to revise the Food and Drugs Act completely, but the requirement pertaining to labeling of contents was proposed to be re-enacted in substantially the same form as in the 1913 amendment. (See C. Dunn, Federal Food, Drug, and Cosmetic Act 29, 39 (1938).) Through the following five years of legislative hearings and revisions, during which time the bill was extensively debated and studied, the language of the weight-labeling requirement remained unchanged until it was enacted in 1938 (52 Stat. 1040). The reason for relatively little change from the 1913 amendment was the intention to carry over the same law. W. A. Campbell, Chief of the Food and Drugs Administration, testified before the Senate Commerce Committee that the proposed revision was "the language of the law at the present time." Hearings on S.2800, 73d Cong., 2d Sess. (1934) in C. Dunn, supra, at 1166. The committee report subsequently noted that the labeling requirement in the bill "merely repeats the provisions of the present law." S.Rep.No. 361, 74th Cong., 1st Sess. (1935) in C. Dunn, supra, at 245.

When Congress reenacts a statute in substantially the same form, it is

presumed to have adopted any prior judicial construction of the language. See, e.g., Shapiro v. United States, 335 U.S. 1, 16 (1948); Dragor Shipping Corp. v. Union Tank Car Co., 371 F. 2d 722, 726 (C.A. 9, 1967). Here the substantial similarity between the 1913 and 1938 enactments, as well as the expressions in the legislative history that it was the intention of the drafters to carry over the existing law, causes that presumption to operate. The continuing validity of Shreveport after the 1938 Act is therefore apparent. In addition, a change in punctuation that accompanied the redrafting indicates an affirmative congressional adoption of the Shreveport interpretation. In Shreveport the Court noted that there would be no doubt that its conclusion was correct if there were a comma after the word "established" in the proviso. 287 U.S. at 82. The bill introduced in Congress seven months later had a comma inserted at that point (see C. Dunn, supra, 38), and the bill became law in that form.

As interpreted by the Shreveport Court, 21 U.S.C. 343(e) and the regulation issued pursuant to it have a special status, which the lower court failed to consider in this case. The substantive requirement is that package labels accurately state the weight of the contents. There is no exception for variations, even if reasonable or unavoidable. There is no exception for overfilling; the statute requires an accurate statement of the contents, not a statement of its minimum contents. Under Shreveport, the proviso and regulations operate to mitigate this hard-and-fast rule. The mitigation takes place not by modifying the requirement for accurate labeling, but by exempting from enforcement those violations which the Secretary deems to be reasonable violations. As the Shreveport Court read the statute, the proviso is a direction to the Secretary formally to announce his in-

tention not to enforce the statute against reasonable variations from stated contents. The regulation constitutes a reassurance to the industry that unavoidable violations will be tolerated and a direction to Government enforcement officers that they should consider the reasonableness of the error in proceeding against violators.

The regulation, therefore, does not govern or affect primary conduct. The court's statement in Rath that the regulation is void "for its inadequacy to set any recognizable standard upon which any individual may measure his conduct or his compliance with the law by which he must order his personal or business life" (357 F.Supp. at 534) misses the point. Shreveport makes clear that the proviso and regulation do not affect the legislative command to the industry. Packagers are to label their products accurately -- not higher, not lower. The proviso and regulation together constitute a formalized prosecutorial discretion or a policy of exercising a power of dispensation. See 1 K. Davis, Administrative Law Treatise, §2.02 n.16 (1958); Note, "The Power of Dispensation in Administrative Law - A Critical Survey," 87 U. Pa. L. Rev. 201 (1938). The regulation is not directed at the conduct of private parties, but at the internal operations of the Food and Drug Administration.

As a statement of policy on the appropriate times for enforcement of the accurate-labeling requirement, 21 C.F.R. 1.8b(q) is not subject to being voided for vagueness. It is well-settled that prosecutorial discretion is an executive matter not subject to judicial review unless an unjustifiable standard is used to discriminate among persons. See, e.g., Oyler v. Boles, 368 U.S. 448 (1962); Newman v. United States 382 F.2d 479 (C.A. D.C., 1967).

Since this regulation is in essence a statement of prosecutorial policy, the same law applies. As the standard here is based on considerations of technical capabilities and not on factors personal to potential defendants, the regulation is not subject to judicial review. The Food and Drug Administration can and will continue to observe the congressional mandate by not enforcing the law against unavoidable violations, and the lower court's ruling thwarting the statutory attempt to have the policy formally on the record should not be sustained.

**B. The Agency's Interpretation of the Statute As Requiring Only the Regulation Issued Supports the Validity of the Regulation**

It is well established that the interpretation given a statute by the agency charged with its administration is to be followed unless it is clearly wrong. See, e.g., Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969); Stevens v. Commissioner of Internal Revenue, 452 F.2d 741, 746 (C.A. 9, 1971). The regulation issued after the 1913 amendment did not establish percentage or other quantitative tolerances, but instead, like the present regulation, enumerated the permissible sources of variation. The pertinent part of the regulation, issued May 11, 1914, was as follows:

- (i) The following tolerances and variations from the quantity of the contents marked on the package shall be allowed:
- (1) Discrepancies due exclusively to errors in weighing, measuring, or counting, which occur in packing conducted in compliance with good commercial practice.
  - (2) Discrepancies due exclusively to differences in the capacity of bottles and similar containers, resulting solely from unavoidable difficulties in manufacturing such bottles or containers so as to be of uniform

capacity; Provided, That no greater tolerance shall be allowed in case of bottles or similar containers which, because of their design, can not be made of approximate uniform capacity than is allowed in case of bottles or similar containers which can be manufactured so as to be of approximate uniform capacity.

(3) Discrepancies in weight or measure due exclusively to differences in atmospheric conditions in various places and which unavoidably result from the ordinary and customary exposure of the packages to evaporation or to the absorption of water.

Discrepancies under classes (1) and (2) of this paragraph shall be as often above as below the marked quantity. The reasonableness of discrepancies under class (3) of this paragraph will be determined on the facts in each case. (U.S. Dep't of Agriculture, Bureau of Chemistry, Service and Regulatory Announcements (May 22, 1914) at 203; subsequently modified slightly and reprinted as modified in C. Dunn, 1 Dunn's Food and Drug Laws 15-16 (1927).)

The agency's contemporaneous and now longstanding interpretation of the statute as requiring only description of the sources of the variations must be accepted in the absence of conclusive evidence of its error.

C. Congressional Reenactment of the Statute Supports the Validity of The Regulation

Moreover, it is an equally well-established rule of construction that a longstanding administrative interpretation of a statutory provision that is reenacted in substantially the same form is deemed to have received congressional approval and has the effect of law. See, e.g., Commissioner v. Estate of Noel, 380 U.S. 678, 682 (1965); NLRB v. Brooks, 204 F.2d 899, 905 (C.A. 9, 1953), aff'd 348 U.S. 96 (1954).

The 1913 enactment amended the statute to read as follows:

Sec. 8 ... That for the purposes of this Act an article shall also be deemed to be misbranded...

In the case of food: ...

Third. If in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count: Provided, however, that reasonable variations shall be permitted, and tolerances and also exemptions as to small packages shall be established by rules and regulations made in accordance with the provisions of section three of this Act.

In 1938 Congress rewrote the Act, but retained substantially identical language for this provision. Under accepted rules of construction, this reenactment constituted a congressional adoption of the agency's long-held position that its regulations on this subject need only describe the permissible variations in general, qualitative terms. The reenactment refutes the contention of the lower court in this case that the Secretary has failed to carry out the statutory mandate. On the contrary, the action of Congress in 1938 was approval of the regulations and is inconsistent with the lower court's ruling now that the statutory intent can be satisfied only through the promulgation of explicit, quantitative tolerances.

II. THE REGULATION CLARIFIES THE IMPORTANT FEDERAL POLICY OF ACCURATE LABELING AND SHOULD THEREFORE BE UPHELD.

Neither the opinion in Rath nor the opinion in this case gives any indication what the court thought to be the difference in the Federal law of labeling once 21 CFR 1.8b(q) was declared void and enforcement officers were "left with the absolute standard of the statute." (Op., p. 3). The implication of this language is that Federal law has somehow been changed by voiding the regulation. The teaching of Sireveport could not be more clear, however, that all the substantive labeling law is contained in the statute



and none in the regulation. In response to the court's order, California has changed its regulation (Cal. Adm. Code, Title 4, Chapter 8, Subchapter 2.1) and now orders off-sale all packages that are less than the weight stated on the label. In short, California has read the lower court's opinion as declaring 21 U.S.C. 343(e) to require labeling of minimum weight in the absence of a regulation permitting variations. If California has correctly interpreted the court's opinion, the court has greatly altered the legislative scheme, and its decision cannot be reconciled with the statute. Thus, an important consideration favoring the validity of 21 CFR 1.8b(q) is its utility in clarifying Federal law.

A. Federal Law Requires a Label To  
State the Package's Accurate -  
Not Its Minimum Weight

The minimum-weight labeling scheme which California has adopted in response to the lower court's opinion in this case might be regarded by some as having advantages. As a regime oriented to the individual purchase, it would assure that each purchaser receives at least as much value as he thought he was getting. It is, however, not the system Congress chose for this country. Instead, 21 U.S.C. 343(e) commands that the weight stated be "accurate," not underweight and not overweight.

Other than to offer the purchaser the ability to know if his particular needs will be satisfied by the quantity he is buying, the main purpose for weight labeling is to aid in the determination of cost. Only by knowing both the price and the weight of the package can a purchaser derive accurate information on the cost of the product, and only when the same information is known about competitive products can accurate comparisons be made. A minimum weight labeling system does not allow the purchaser to make an

accurate computation of cost. In a minimum-weight system, where all packages must be above the stated weight, there will still be variations in package weights caused by the unavoidable deficiencies of the filling machinery. But instead of these variations clustering near the stated weight, they will cluster around some unknown weight above the stated weight. The price of packages will, of course, be set in consideration of their average actual weight, not their stated weight. Consequently, the purchaser, who cannot determine the amount of overfill, and therefore cannot determine the weight on which the price is based, is less able to calculate the true cost of the product. Moreover, in making comparisons between products, there is no way of a purchaser's knowing whether different manufacturers have selected the same percentage of overfill. The choice is thus between knowing the least possible value of a package or knowing the actual value of an average package. The latter choice would seem to be much more useful to consumers over time and is the result of the accurate-weight system adopted by Congress. In any event, Congress has spoken, and its choice in favor of accurate weight must be observed.

Similar reasoning to that permitting reasonable variations due to filling machinery errors underlies the policy permitting some variation from stated weight for gain or loss of moisture. Any kind of measurement is meaningful only when the conditions under which the measurement is made are understood. The length of metal bars, for example, varies with the temperature, and the weight of a given volume of gas depends on the pressure it is under. Similarly, with food a common problem is the amount of moisture it contains. A package of flour that is five percent heavier than another is not worth any more if the additional weight is just water. Consequently, the moisture

content of a package of flour must be known before its value can be understood or compared with other packages of flour.

The problem of labeling packages when unavoidable gain or loss of moisture occurs after a package of flour leaves the manufacturer cannot be easily solved. The statute requires "accurate" labeling, but the inevitable gain or loss of moisture is unpredictable, and compliance with the terms of the statute is therefore extremely difficult. Moreover, even if moisture changes for a particular lot of flour could be estimated and the packages overfilled or underfilled accordingly, thereby complying with the letter of the statute, value comparisons would be distorted unless all lots of flour to be sold in competition with it had been overfilled or underfilled to the same extent. One package, for example, might be overfilled more than another in anticipation of longer transportation or storage times or of intermediate storage under especially dry conditions. Although both packages might have the same actual weight by the time a consumer buys them, the originally-heavier package would in fact be more valuable. Loss of water might have equalized the weights, but the originally-heavier package would have started with more flour solids, and it would still have more. Looking only at the prices and the stated weights, the consumer would have no idea which package was more valuable. Ironically, in the case of flour, strict adherence to the letter of the statute produces a useless result that is wholly inconsistent with the intent of the statute.

There is no perfect solution available to accommodate the difficulties of natural phenomena to the congressional mandate for labeling of accurate weight and to the need to provide consumers with useful information. The Food and Drug Administration has, however, developed a complete regulatory

scheme for flour, which goes a long way toward that end, but which was ignored by the lower court in this case. Under present regulations, the maximum moisture content of flour is fixed by 21 CFR 15.1(a) at 15 percent at the time it is packaged, and the package is accurately labeled as to its weight at that time. If there is subsequent gain or loss of moisture, that change does not affect the value of the product. If a package has lost five percent of its weight because of moisture loss, the package is nevertheless still equivalent to the stated weight at the Government-specified moisture level. Only the valueless water has disappeared; the nutrient solids are still entirely present. 21 CFR 15.1(a) combines with 21 CFR 1.8b(q) to create a workable elaboration of the labeling statute, one that seeks to effect the intent of the legislation. In the case of packaging and labeling flour, an unthinking insistence on accurate labeling of weight at the time of retail sale does not necessarily best serve the needs of consumers. If moisture content is not considered, the stated weight may be extremely deceptive. The present regulation carries out the statute's purpose and should be upheld.

B. State Enforcement Must Be  
Consistent With Federal Policy  
On Accurate-Weight Labeling.

The lower court in this case properly recognized that Federal standards preempt state law in regard to labeling requirements. (Op., p.2). The test for Federal preemption is whether the state regulation can be enforced without "impairing the federal superintendence of the field .... A holding of federal exclusion of state law is inescapable ... where compliance with both federal and state regulations is a physical

impossibility for one engaged in interstate commerce...." Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963). As it is impossible for a package to be labeled accurately in accordance with Federal weight-labeling standards and at the same time to be labeled in accordance with a different minimum-weight state standard, Federal law governs. The pertinent Federal statute, 21 U.S.C. 343(e), ~~separately~~ sets the rarely achievable standard of accuracy and depends on enforcement discretion to carry out its fair administration. No package will ever have so accurate a label that sensitive measuring equipment cannot detect a discrepancy. Enforcement policy thus is crucial to achievement of the substantive requirements: since most packages will vary from the stated weight, the enforcement policy cannot be arbitrary, but must encourage labeling as close to accuracy as possible.

It is well-settled that the supremacy clause (U.S. Const. Art. VI) requires state programs to respect Federal policy as well as the letter of Federal statutes. See, e.g., Nash v. Florida Industrial Commission, 389 U.S. 235 (1967); Farmers Educational and Cooperative Union v. WDAY, Inc., 360 U.S. 525, 535 (1959). To avoid inconsistency with Federal law and policy, state enforcement policy must therefore support the Federal requirement of accurate labeling. A state policy of prosecuting short-weight packages, no matter how little the actual weight is less than the stated weight, would be inconsistent with Federal law and policy and would be barred by the supremacy clause. Such a policy would compel manufacturers to overfill packages in order to avoid sanctions for unavoidable variations, and a tendency away from accurate labeling would thereby be encouraged. State enforcement policy must therefore recognize unavoidable variations

if it is to be consistent with the Federal statutory requirement of accurate labeling. In short, the policy embodied in 21 CFR 1.8b(q) must be recognized in state law whether or not the Federal regulation exists. Its existence clarifies that requirement and avoids a misinterpretation of the kind California has made in its recently promulgated regulation. The validity of the Federal regulation should therefore be upheld, as it is a description of the policy that state, as well as Federal, enforcement must apply to fulfill the intent of the statute.

### III. THE REGULATION IS EXPLICIT AND NOT VAGUE.

#### A. The Instruction to Packagers is Clear.

The regulation's definition of permissible variations is sufficiently explicit to give clear guidance to manufacturers. Other than variations related to moisture, variations are tolerated only when they arise from "unavoidable deviations in good manufacturing practice." The language allows no choice of conduct to packagers; variations are permitted only when they are "unavoidable." The reference to "good manufacturing practice" indicates that packagers are permitted to use ordinary commercial equipment and need not use scientific apparatus, but other than that there are no alternatives that might make a manufacturer uncertain of his obligation. "Unavoidable" is an explicit term and creates no doubt.

The provision for variations caused by gain or loss of moisture during the course of good distribution practice is equally explicit. The requirement for "good distribution practice" is parallel to the requirement for good manufacturing practice and indicates the necessity only for ordinary commercial methods. Once such methods are followed, the only



moisture changes tolerated are those unavoidable changes owing to natural phenomena. In effect, the requirement on moisture also permits only unavoidable variations and leaves no doubt to the manufacturer of his obligations under the law.

B. The Instruction to Enforcement  
Officers Is Clear.

The lower court worries that "each enforcement officer is left to his own personal standard of what is reasonable" and that this possibility makes the regulation impermissibly vague. (Op. p.3.) Although the possibility that individual officers might interpret a regulation differently has not previously been thought to constitute vagueness, even under this standard the regulation is sufficiently explicit. The moisture content of a sample of flour can be determined by routine laboratory methods, and since the weight of water is known, it can be easily calculated whether the sampled product has as much solids content as would a package of flour of the stated weight containing the permissible percentage of moisture under the Federal standard, 21 CFR 15.1(a). If it does, it is a reasonable variation; if it does not, enforcement action should be taken. The administration of this part of the regulation is entirely technical, and there is no opportunity for an officer's judgment on what is reasonable.

In respect to variations arising from the packaging process, the officer must exercise some judgment, but not on the question of what variation is "reasonable." Instead, the judgment is made as to what deviations are "unavoidable." That judgment requires an understanding of the capabilities of commercial packaging machinery, and the only source of difference in judgment among enforcement officers would be a difference of opinion on what

their capabilities were. That possibility is hardly the unbridled discretion that the lower court asserts exists under the regulation.

CONCLUSION

Certain variations from stated weight must be recognized if the Federal statutory policy of accurate-weight labeling is to be carried out. The only inconsistency between California law and Federal law is California's refusal to acknowledge the Federal policy in favor of allowing certain variations caused by gain or loss of moisture where necessary to effect the intent of 21 U.S.C. 343(e). Initially, this court should make clear that 21 CFR 1.8b(q) is a valid expression of Federal policy. In addition, the case should be remanded to the district court with directions to modify its injunction so as to prohibit application of state off-sale procedures against products in compliance with Federal labeling standards as elaborated by 21 CFR 1.8b(q).

Respectfully submitted.

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# CHECKING PREPACKAGED COMMODITIES

A Manual for Weights and Measures Officials

Malcolm W. Jensen

NATIONAL BUREAU OF STANDARDS

HANDBOOK 67



U.S. DEPARTMENT OF COMMERCE • Lewis L. Strauss, Secretary

NATIONAL BUREAU OF STANDARDS • A. V. Astin, Director

Issued March 20, 1959

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Washington 25, D.C. - Price 35 cents

procedures in conjunction with and during the store visits made for the primary purpose of scale testing, major efforts in package checking will be most effective if they are separated from other phases of the weights and measures enforcement program. For a sustained program of package checking in a large jurisdiction, it is suggested that the very best results will be obtained if this activity is carried on by trained specialists who concentrate on this type of work.

The inspector assigned principally to mechanical inspections and only as a side line to package checking will normally execute this phase of his work in the retail stores. Occasionally even he will find it advantageous to check packages at wholesale distributors and even, in special circumstances, at the establishment of the manufacturer or packer. The specialist assigned full time to this work will find that much of his activity is carried on at the locations of the distributors and the packers in his jurisdiction. He will "run down" reports of package inaccuracies reported by other inspectors and, on his own initiative, spot-check distributors of packaged merchandise.

The primary object of the inspector in this field is to see that quantity is accurately represented to the ultimate purchaser—the consumer; nevertheless, he may be of very real service to the manufacturer, distributor, and retailer if he is able to identify the exact point at which any shortages begin to appear.

Certain packaged products distributed through the normal packer-to-distributor-to-retailer channel are subject to gain or loss of weight through the increase or decrease in moisture content, beginning immediately after the packaging occurs.

The Model Regulation provides that "variations from the stated weight or measure shall be permitted when caused by ordinary and customary exposure \* \* \* to conditions which normally occur in good distribution practice and which unavoidably result in change of weight or measure." The distribution point after which such shrinkage losses are permitted is a statutory or regulatory provision that varies among the States.

It is admitted that such indefinites as "ordinary and customary exposure" and "good distribution practice" are difficult to set forth quantitatively; thus the experience and judgment of the inspector must be relied upon. He will learn to compare various environments and various systems of distribution and storage. As the result of his experience he will be able to develop procedures for conducting a sound investigation that will result in the building up of a working knowledge as to what is "customary exposure" and what may be con-



sidered to be "good distribution practice" with respect to the packages of an individual commodity that may gain or lose weight through gain or loss of moisture.

To be truly adequate, a package-checking program must be extensive with respect to the relative time spent, and diversified with respect to the types of packages checked. General coverage of the packages offered for sale in the jurisdiction is the key to adequacy and appropriateness. A program should not be directed to a single type of package, such as fresh meats in self-service markets, or even to a few types. Packages distributed through interstate commerce, canned peas and bottled vinegar, for example, should receive a proportionate share of attention.

Although a weights and measures administrator will direct concentration on specific items for special surveys or to correct quickly faults that have been discovered, he will plan the general program so as to "sample" all areas of commodities sold in packages.

### 3. CLASSES OF PREPACKAGED COMMODITIES

There are two distinct classes of prepackaged commodities—"random" packages, representing packages of a single commodity in a variety of random sizes which in most cases are put up in the retail store, and "standard-pack" packages, representing packages of a single commodity put up in selected sizes. Within the standard-pack class there are two categories, those packages sold by weight and those sold by liquid measure. Although in certain respects the operations in regard to "random" and "standard-pack" packages differ, the equipment used for the checking and the approach to the checking activity are similar in each case.

### 4. EQUIPMENT

In the belief that the testing equipment used by a weights and measures official should be, insofar as practicable, "standard" equipment designed especially for and restricted to official use and tested regularly and completely controlled by the official, the procedures described here will, for the most part, involve the use of special equal-arm package-reweighing scales and standard test weights. It is recommended that the first such scale required for this work be one of nominal 3-pound (actual, with careful use, 10-

of the packaging material, and then place on the load-receiving element of the scale standard weights in an amount equal to the tare weight plus the labeled weight. Note the exact indication of the scale (either automatically indicated or indicated by poise placement—with or without counterpoise weights—as the case may be). Remove these standard weights from the load-receiving element and place thereon a package to be weighed. Restore precisely the previously noted scale indication by adding or removing standard weights. The weights thus added or removed indicate the package error—*short* (minus) if weights are *added*, *over* (plus) if weights are *removed*.

Because some shortages in package weight are caused by the leaking of fluids from the commodity, and because certain packages are sufficiently watertight that they will hold such leaked fluid, it will be advisable to make special observation in certain instances. If a package containing a commodity suspected of leaking is transparent, and if any tray, cup, or other absorbent packaging material apparently has not absorbed any moisture, the package may be turned upside down so that any fluid will run to the transparent top and be easily seen. If fluid is apparent inside the package, or if the packaging material appears to be or to have been wet and soggy, the package should be opened and the net weight determined directly.

**Step 2. Recording** (see also Section 11).—Record the labeled weight and the error in  $\frac{1}{16}$  ounce for each small package, or in an appropriate denomination for each large package. The zero errors (recorded as 0) and the plus errors are listed in one column, the minus errors in a second column. (See example, Step 5.)

**Step 3. Unreasonable errors.**—Circle errors that are "unreasonably" large, either plus or minus. The decision as to the unreasonableness of an error, though of necessity arbitrary, must be made and may be predicated, to a certain extent, on knowledge. Consideration should be given to (1) the allowable error in the commercial device employed in the packaging process, (2) the possible error in the scale used to check the packages, (3) anticipated reasonable human errors in both operations, and (4) the susceptibility of the packaged commodity to accurate weight control at the time of packaging. The table that follows is suggested for both random and standard-pack packages that contain items of such a nature that they are susceptible of precise weight control. Standard-pack packages of such commodities as apples, potatoes, and the like cannot be controlled as pre-



cisely as can packages of commodities such as peas, corn, sugar, salt, and flour; consequently the inspector must exercise greater liberality in the determination of the reasonableness or unreasonableness of errors in packages containing large individual elements.

(It will be noted that the suggested plus allowances are twice the suggested minus allowances at each "labeled quantity." This is an acknowledgment that packers must be allowed to overfill such packages as are susceptible of moisture loss.)

#### UNREASONABLE MINUS OR PLUS ERRORS

Labeled quantity	Minus error Greater than	Plus error Greater than
0 to 2 ounces.....	$\frac{1}{8}$ ounce.....	$\frac{1}{8}$ ounce.
2+ to 8 ounces.....	$\frac{1}{4}$ ounce.....	$\frac{1}{4}$ ounce.
8 ounces+ to 2 pounds.....	$\frac{1}{2}$ ounce.....	$\frac{1}{2}$ ounce.
2+ to 4 pounds.....	$\frac{3}{8}$ ounce.....	$\frac{3}{8}$ ounce.
4+ to 7 pounds.....	$\frac{1}{2}$ ounce.....	$\frac{1}{2}$ ounce.
7+ to 14 pounds.....	$\frac{1}{2}$ ounce.....	1 ounce.
14+ to 24 pounds.....	$\frac{3}{4}$ ounce.....	1 $\frac{1}{2}$ ounces.
24+ to 36 pounds.....	1 ounce.....	2 ounces.
36+ to 51 pounds.....	8 ounces.....	1 pound.
51+ to 101 pounds.....	2 pounds.....	4 pounds.

The figures offered above are suggested for the determination of the "reasonableness" of errors in individual packages; they should not be used as tolerance figures.

**Step 4. Action based on unreasonable errors.**—Action should be taken with respect to the packages with unreasonable errors (either + or -); the following is suggested:

(a) If one package of the sample of 10 packages has an unreasonably large *minus* error, that package may be ordered repacked or relabeled, or may be held to constitute a violation of the statute and taken as evidence, at the discretion of the inspector.

(b) If there are in the sample of 10 packages 2 or more packages with unreasonably large *minus* errors, the *entire lot* should be held in violation, *without further calculation*. Appropriate action with respect to ordering off sale, prosecution, or the like should be taken. (See 10. Official Action.)

(c) If 3 or less of the sample of 10 packages have unreasonably large *plus* errors, these should be called to the attention of the market operator or the person responsible.

(d) If there are in the sample of 10 packages 4 or more packages with unreasonably large *plus* errors, this should be considered to show poor packaging practice, without further calculation. This situation should be called to the attention of the store operator, who should be instructed as to more precise weighing.

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#### Affidavit of Malcolm W. Jensen

(Filed December 19, 1973)

STATE OF NEW JERSEY)

ss:

COUNTY OF ESSEX )

MALCOLM W. JENSEN, being duly sworn, deposes and says:

1. At the present time I am and since April 1973 have been president of the Can Manufacturers Institute, a trade association with offices at 1625 Massachusetts Avenue, N.W., Washington, D.C. Prior to April of this year I was for many years employed by the United States Government. From July 1951 to July 1960 I was Assistant Chief of the Office of Weights and Measures, National Bureau of Standards in the United States Department of Commerce. In July 1960 I became Chief of that office and served in that capacity until April 1966, when I became Manager of Engineering Standards which included the Office of Weights and Measures. From April 1969 to December 1970 I was first, Deputy Director and later Director of the Institute of Applied Technology, National Bureau of Standards in the United States Department of Commerce, which had jurisdiction over some ten technical divisions, including the Office of Weights and Measures. From December 1970 to March 1971, I was Deputy Director of the Bureau of Domestic Commerce and from March 1971 to April 1973, when I retired from the government service, I was Director of the Bureau of Product Safety—Food and Drug Administration—in the United States Department of Health, Education and Welfare. Prior to my employment by the United States Government I was the Sealer of Weights and Measures of the City of Madison, Wisconsin, and also taught mathematics at the

University of Wisconsin. As the result of my said employment and experience I have extensive and detailed personal knowledge of the matters hereinafter stated.

2. During the period when I served as Assistant Chief of the Office of Weights and Measures in the National Bureau of Standards I prepared and wrote the Handbook entitled "CHECKING PREPACKAGED COMMODITIES, a Manual for Weights and Measures Officials," which was issued on March 20, 1959 by the National Bureau of Standards as "Handbook 67." The information and procedures set forth in the said Handbook are based upon my own extensive experience in dealing with the control of prepackaged commodities and upon information which I assembled in my capacity as Assistant Chief of the Office of Weights and Measures.

3. I have been requested by counsel for plaintiffs in this action to state the source of the table of figures which appears in Section 8.1, at page 8 of Handbook 67, under the heading, "UNREASONABLE MINUS OR PLUS ERRORS," and whether those figures have any relationship to variations, after packaging, in the weight of a hygroscopic commodity such as flour caused by changes in the relative humidity to which the package is exposed.

4. The said table of "Errors" was based solely upon information which was collected by me or under my supervision with respect to errors in the weight of packaged commodities which resulted from "deviations" at the time of packaging either because of the nature of the commodity or the limitations of the packaging machinery or of humans involved in the packaging or check-weighing operation. The said figures have nothing whatsoever to do with "variations" in the weight of hygroscopic commodities which occur, after the packing process is completed, as the result of a gain or loss of moisture caused

by changes in the relative humidity to which the commodity is exposed.

5. A thoughtful reading of the paragraph in which the table appears, together with a reading of Section 2 of Handbook 67, will clearly demonstrate the accuracy of the foregoing statement. I refer particularly to the language of the last three paragraphs at page 2 of Handbook 67 which expressly advises the inspector how to deal with problems resulting from "gain or loss of weight through the increase or decrease of moisture content beginning immediately after the packaging occurs." The following language at that point is particularly significant:

"Certain packaged products distributed through the normal packer-to-distributor-to-retailer channel are subject to gain or loss of weight through the increase or decrease of moisture content, beginning immediately after the packaging occurs.

The Model Regulation provides that 'variations from the stated weight or measure shall be permitted when caused by ordinary and customary exposure . . . to conditions which normally occur in good distribution practice and which unavoidably result in change of weight or measure.' The distribution point after which such shrinkage losses are permitted is a statutory or regulatory provision that varies among the States.

It is admitted that such indefinites as 'ordinary and customary exposure' and 'good distribution practice' are difficult to set forth quantitatively; thus the experience and judgment of the inspector must be relied upon. He will learn to compare various environments and various systems of distribution and storage. As the result of his experience he will be



able to develop procedures for conducting a sound investigation that will result in the building up of a working knowledge as to what is 'customary exposure' and what may be considered to be 'good distribution practice' with respect to the packages of an individual commodity that may gain or lose weight through gain or loss of moisture."

6. By contrast, Step 3 under Section 8 of Handbook 67 deals with the problem of handling deviations which occur in the packing process and admonishes the weight inspector as follows:

"Consideration should be given to (1) the allowable error in the commercial device employed in the packaging process, (2) the possible error in the scale used to check the packages, (3) anticipated reasonable human errors in both operations, and (4) the susceptibility of the packaged commodity to accurate weight control at the time of packaging. The table that follows is suggested for both random and standard-pack packages that contain items of such a nature that they are susceptible of precise weight control. Standard-pack packages of such commodities as apples, potatoes, and the like cannot be controlled as precisely as can packages of commodities such as peas, corn, sugar, salt, and flour; consequently the inspector must exercise greater liberality in the determination of the reasonableness or unreasonableness of errors in packages containing large individual elements."

It is significant that the commodities referred to at that point in Handbook 67 are listed in a sequence of diminishing size, thus potatoes are smaller than apples, peas are smaller than potatoes, corn is smaller than peas, grains of sugar are smaller than kernels of corn, salt is finer than sugar, and flour is finer than salt. The point is that it is

more difficult to package precisely predetermined weights of large units of food than it is to package precise weights of smaller units of food and that the inspector should be aware of that fact when he gives consideration to "(4) the susceptibility of the package commodity to accurate weight control at the time of packaging."

7. On the basis of my personal knowledge and experience, it would be inappropriate to use the table of "Errors" which appears at page 8 of Handbook 67 as a guide to the "reasonableness" of variations in the weight of a hygroscopic commodity caused by changes in its moisture content as the result of exposure to changing relative humidity. I know, for instance, that a five-pound package of flour could lose as much as 8% of its original packaged weight when exposed to the relative humidities of less than 20% which normally and frequently occur during the winter in the northeastern part of the United States in a normally heated retail grocery store. As applied to a five-pound bag of flour, the resulting 8% loss in that situation would amount to more than six ounces; whereas the table of "Errors" in Handbook 67 would suggest that a loss greater than three-eighths of an ounce would be unreasonable.

8. I have read the "Affidavit in Opposition" filed in this cause and sworn by Miss Betty Furness on November 5, 1973 in her capacity as Commissioner of the New York City Department of Consumer Affairs. In that affidavit she states in substance that weights and measures inspectors in her department and elsewhere use the "objective federal guide lines contained in Handbook 67" to determine whether or not moisture loss in packages of hygroscopic foods is the result of "ordinary," "customary" and "unavoidable" exposure occurring in "good distribution practice." As the author of Handbook 67, I am con-



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*Affidavit of Malcolm W. Jensen*

strained to say that such use of the so-called 'objective federal guide lines (meaning the table of "Errors" appearing at page 8 of Handbook 67) is a misuse of the Handbook and indicates a misunderstanding of the purpose and application of the so-called "guide lines."

/s/ Malcolm W. Jensen  
MALCOLM W. JENSEN

NOTARIZED

U. S. DEPARTMENT OF COMMERCE  
NATIONAL BUREAU OF STANDARDS

MODEL STATE PACKAGING AND LABELING REGULATION  
1975

as adopted by

The National Conference on Weights and Measures

The National Conference on Weights and Measures is sponsored by the National Bureau of Standards in partial implementation of its statutory responsibility for "cooperation with the States in securing uniformity in weights and measures laws and methods of inspection."

SECTION 12. VARIATIONS TO BE ALLOWED.

12. 1. Packaging Variations.

12. 1. 1. Variations from Declared Net Quantity. --Variations from the declared net weight, measure, or count shall be permitted when caused by unavoidable deviations in weighing, measuring, or counting the contents of individual packages that occur in good packaging practice, but such variations shall not be permitted to such extent that the average of the quantities in the packages of a particular commodity, or a lot of the commodity that is kept, offered, or exposed for sale, or sold, is below the quantity stated, and no unreasonable shortage in any package shall be permitted, even though overages in other packages in the same shipment, delivery, or lot compensate for such shortage. Variations above the declared quantity shall not be unreasonably large.

12. 1. 2. Variations Resulting from Exposure. --Variations from the declared weight or measure shall be permitted when caused by ordinary and customary exposure to conditions that normally occur in good distribution practice and that unavoidably result in change of weight or measure, but only after the commodity is introduced into intrastate commerce: Provided, That the phrase "introduced into intrastate commerce" as used in this paragraph shall be construed to define the time and the place at which the first sale and delivery of a package is made within the state, the delivery being either

- (a) directly to the purchaser or to his agent, or
- (b) to a common carrier for shipment to the purchaser, and this paragraph shall be construed as requiring that, so long as a shipment, delivery, or lot of packages of a particular commodity remains in the possession or under the control of the packager or the person who introduces the package into intrastate commerce, exposure variations shall not be permitted.

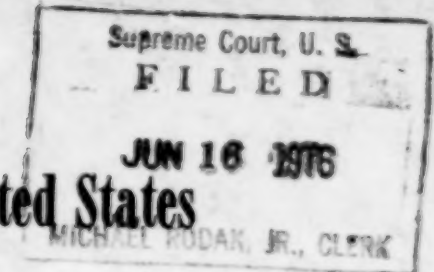
12. 2. Magnitude of Permitted Variations. --The magnitude of variations permitted under Sections 12, 12. 1., 12. 1. 1., and 12. 1. 2. of this regulation shall, in the case of any shipment, delivery, or lot, be determined by the facts in the individual case.

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of June, A.D. 1976.

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IN THE  
**Supreme Court of the United States**



October Term, 1976  
No. 75-1053

JOSEPH W. JONES, as Director of the County of Riverside, California, Department of Weights and Measures,

*Petitioner,*

vs.

THE RATH PACKING COMPANY, *et al.*,

*Respondents.*

On Writ of Certiorari to the United States Court of Appeals  
for the Ninth Circuit.

**BRIEF FOR THE PETITIONER.**

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IN THE  
**Supreme Court of the United States**

October Term, 1976  
No. 75-1053

JOSEPH W. JONES, as Director of the County of Riverside, California, Department of Weights and Measures,

*Petitioner,*

vs.

THE RATH PACKING COMPANY, *et al.*,

*Respondents.*

On Writ of Certiorari to the United States Court of Appeals  
for the Ninth Circuit.

**BRIEF FOR THE PETITIONER.**

**Opinions Below.**

The opinions of the Court of Appeals (Pet. App. 1-55)<sup>1</sup> are reported at 530 F.2d 1295 and 530 F.2d 1317.

**Jurisdiction.**

The judgments of the Court of Appeals were entered October 29, 1975 (S. App. 1, 35). The Petition for

<sup>1</sup>References to the Single Appendix will be abbreviated as "S. App."; to the Appendix attached to the Petition as "Pet. App."; and to the Appendix attached to the Amici Curiae Brief filed by the Attorney General in support of the Petition as "A. Gen. A.C. Brf. (Pet.) App."



a Writ of Certiorari was filed January 26, 1976, and was granted April 19, 1976. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

### Question Presented.

Whether enforcement provisions of the California statutes and regulations pertaining to accuracy of weights and measures are preempted by Federal laws pursuant to Article 6, Clause 2, of the Constitution of the United States.<sup>2</sup>

### Constitution, Statutes and Regulations Involved.

#### California.

Business and Professions Code, section 12211, Stats. 1939, c. 43, p. 450, as amended Stats. 1949, c. 1384, p. 2407; Stats. 1957, c. 1658, p. 3038; Stats. 1963, c. 353 (Pet. App. 69);

4 California Administrative Code, Chapter 8, Subchapter 2, Article 5 (Sometimes referred to in the text as "Article 5") (Pet. App. 70).

#### Federal.

Constitution of the United States, Article 6, Clause 2 (footnote 2);

52 Stat. 1047, 21 U.S.C. section 343(a) and (e) (Pet. App. 90);

<sup>2</sup>Art. 6, Clause 2. *Supreme Law of Land.*

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

81 Stat. 584, 21 U.S.C. section 601(n)(1) and (5) (Pet. App. 91);

81 Stat. 600, 21 U.S.C. section 678 (Pet. App. 91);

80 Stat. 1296, 15 U.S.C. sections 1451 *et seq.*;

9 Code of Federal Regulations, section 317.2 (h)(2), page 503 (Pet. App. 93);

21 Code of Federal Regulations, section 1.8b (q), page 17 (Pet. App. 92).

### Statement.

Petitioner, Joseph W. Jones, will hereafter be referred to as "Jones." Respondent, The Rath Packing Company, will be referred to as "Rath"; and respondents, General Mills, *et al.*, will at times be referred to as the "millers." Concurrently with the filing by Jones of his Petition to this Court (Docket No. 75-1053) L. T. Wallace [successor to C. B. Christensen] as Director of Food and Agriculture of the State of California, and M. H. Becker, as Director of the County of Los Angeles Department of Weights and Measures, filed a separate Petition for a Writ of Certiorari involving only The Rath Packing Company as a respondent (Docket No. 75-1052). The latter Petition is still pending for disposition. However, the entire record of the District Court and Court of Appeals underlying case No. 75-1052 has been filed here along with the record underlying case No. 75-1053, and appropriate portions of the records in both cases have been included in the Single Appendix.

All of the respondents are producers, processors, and packagers of food products, are engaged in interstate commerce and do business in California (S. App.

2, 7). Jones is the Director of the Department of Weights and Measures in Riverside County, California (S. App. 2, 7). He is authorized to inspect stores and other sales outlets to detect violations of the California laws pertaining to weights and measures of commodities, including packaged food products, sold to wholesalers, retailers, and consumers (S. App. 38, 39). The purpose of such inspections is to guard against unfair competition and consumer fraud.

This proceeding arises under the Federal Wholesome Meat Act of 1967, the Federal Food, Drug and Cosmetic Act, the Federal Fair Packaging & Labeling Act, and the California Business and Professions Code. It involves the unfair competition and consumer protection provisions of weights and measures laws. The immediate subjects of the actions are short-weight packages of meat food products and wheat flour packed by the respective respondents (S. App. 19, 47, 48, 54, 55).

Jones policed the weights of the food packages by examining sample packages taken from groups of apparently identical packages (lots), according to California regulations requiring accuracy on the lot average.

Lots determined by Jones to be short weight or short quantity on the average were ordered "off sale" (S. App. 20). A lot marked off sale could be rectified by removal of sufficient short-weight or short-quantity packages to bring the lot average up to the labeled quantity (S. App. 39).

Respondents contended in the Courts below that the California statute and regulations are in conflict with, and preempted by, federal statutes dealing with packaged commodities misbranded as to labeled quan-

tity. The respondents sought declaratory relief and further sought to enjoin Jones from enforcing the California regulations through the process of ordering the merchandise off sale (S. App. 6, 51).

In two separate proceedings, the first one involving Rath, the second one, the three milling companies, the United States District Court for the Central District of California granted the respondents' respective motions for summary judgment (Pet. App. 53 and 58), and the judgments were affirmed by the United States Court of Appeals for the Ninth Circuit in two separate opinions filed on October 29, 1975 (Pet. App. 1-52).

#### Summary of Argument.

In contending that the preemption rule does not apply here, petitioner starts with the basic premise that the California weights and measures regulations, prohibiting unfair competition and unfair or deceptive acts or practices, derive their force from the police powers originally belonging to the States and preserved to them by the 10th Amendment. Historically food products have been subject to State regulation, and there are cogent factors that bring them within the *mainstream* of the State's police powers. In general, weights and measures assurance is so basic a right that it antedates our nation's Constitution, and, indeed, dates back to the Magna Carta. Standards of weights and measures were applied then, as now, at the time and place of sale.

Effective governmental control of weights and measures, whether it be of food products or any other commodity, is essential to any advanced society. Such control has two parts; first, the setting of physical



standards, such as the mass of the pound and the volume of the gallon; and second, enforcement to assure that full measure is in fact given at the time and place of sale. Both parts are necessary to prevent unfair competition and fraud on purchasers.

From the beginning of our nation the principles of the Magna Carta have prevailed among the States. The Secretary of Commerce, of course, sets the standards of weights and measures pursuant to Article I, Section 8, Clause 5, of the Constitution and 31 Stat. 1449, 15 U.S.C. 272. Under 15 U.S.C. 272, first enacted in 1901, the Secretary has been authorized to cooperate (through the National Bureau of Standards) "with the states in securing uniformity in weights and measures laws and methods of inspection." Furthermore, since 1905, the National Bureau of Standards, through the National Conference on Weights and Measures, has constructed a web of interconnected use procedures pursuant to 15 U.S.C. 272 which are enforced by the States.

An important part of the National Bureau of Standards system is the inspection of packaged commodities. The Bureau estimates the national transactions subject to weights and measures at \$900 billion annually, a substantial part of which involves packaged goods. Packages of food products involved in the Ninth Circuit opinions are an important part, but only a part, of the products covered by State weights and measures inspection.

California, like the overwhelming majority, if not all, the states, uses the principles of the National Bureau of Standards *Handbook 67* for inspecting packaged commodities. The principles applied by petitioner Jones

in making the inspections in question are set forth in Section 12211 of the California Business and Professions Code and 4 California Administrative Code, Chapter 8, Subchapter 2, Article 5, commonly referred to as "Article 5." The standard under Handbook 67 and Article 5 is accuracy on the average of the lot (of packaged commodities) *at the time and place of sale*. The volume and variety of packages in commerce preclude effective enforcement according to the Ninth Circuit's theory of package-by-package inspection. Enforcement by lots of the same product (apparently identical packages in the same place) is most necessary. Accuracy in each package is too expensive to be compatible with good manufacturing and distribution practice. Reasonable variations from accuracy of packages, both over and under, are allowed as to individual packages because of the nature of packaging machinery and the need to slightly overpack certain products which may lose moisture during distribution.

There is little weights and measures inspection by federal officials in either the foreign or domestic plants, and even less enforcement, Report No. 94-684, 94th Congress, 2d Session, Consumer Food Act of 1976, pages 1-4. Considering that the Food and Drug Administration inspects food packaging plants on the average of about once every five to seven years, *ibid.* 4, and primarily for adulteration of products, it may fairly be said that self-regulation as to weights and measures, rather than governmental enforcement, prevails in the FDA system.

It thus appears that if accuracy (on the average) of the weight or measure of lots of commodities is to be achieved, such result must be accomplished by the States. Under the States' current enforcement policy



based on the federal standard promulgated by the National Bureau of Standards, enforcement is achieved with mathematical accuracy and applies to all packaged products, without favoritism. Under the Ninth Circuit's principle of package-by-package inspection, both State and federal inspectors would face an impossible task. Since the Ninth Circuit's opinions apply to all products under the Wholesome Meat Act and the Food, Drug, and Cosmetic Act, thousands of products and thousands of packaging plants are involved and the task is one of complete impracticality.

The inevitable result of the lower Court's decisions is to allow *shortages* in "reasonable" amounts for *every package* of every product subject to the Wholesome Meat Act, the Food, Drug and Cosmetic Act and the Fair Packaging and Labeling Act. In other words, a procedure allowing *shortages* is substituted for a procedure requiring *accuracy* of weights and measures.

Petitioner submits that the following results could emerge from an application of the principles laid down by the Ninth Circuit:

1. Inflation across the country on a massive scale as billions of dollars worth of packages become short measure and purchasers have to pay more for the same amount of product.
2. Unfair competition in business on a similar massive scale as State inspectors are enjoined from using any enforceable standard to mark off sale short quantity packages. Section 5 of the Federal Trade Commission Act prohibiting "unfair or deceptive acts and practices" would become a nullity in the most central aspect of commerce. The doctrine of *Federal Trade Commission v. Sperry and Hutch-*

*inson Company*, 405 U.S. 233, 31 L.Ed.2d 170, 92 S.Ct. 898 (1972), that the Federal Trade Commission Act was designed to prevent such practices would become meaningless.

The error of the Ninth Circuit's holding of preemption is further found in the legislative history, and in the scope and purpose, of the federal Acts, which together contradict the proposition that Congress intended to oust State authority with respect to weights and measures of commodities. In fact, the Federal Wholesome Meat Act, 21 U.S.C. 678, grants express jurisdiction to the States to serve concurrently with the Secretary of Agriculture in preventing the distribution of adulterated and misbranded commodities, including commodities misbranded as to weight or quantity of package contents.

Since California is in stride with her sister States in following a federal standard developed and refined by the Secretary of Commerce, and since there is nothing in the history or scope of the federal Acts indicating that Congress has "unmistakably so ordained" preemption of State laws (compare *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142, 10 L.Ed.2d 248, 83 S.Ct. 1210), the decisions of the Ninth Circuit should be reversed, and the California statute and regulations should be restored to vitality.

In sum total, the "weight" of the factors supporting the validity of California weights and measures laws and regulations is indeed massive.

## ARGUMENT.

### I

#### STATES POSSESS BROAD AUTHORITY UNDER THEIR POLICE POWERS TO PREVENT UNFAIR COMPETITION AND CONSUMER FRAUD BY REGULATING WEIGHTS AND MEASURES OF COMMODITIES.

Petitioner's basic position is that the California statute and regulations<sup>3</sup> derive their force from the police powers originally belonging to the States and preserved to them by the 10th Amendment.<sup>4</sup> Exercise of police power is presumed to be constitutionally valid, and the presumption of reasonableness is with the State. *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 596, 8 L.Ed.2d 130, 82 S.Ct. 987 (1962) and cases cited (Town of Hempstead, New York, enacted a zoning ordinance regulating the dredging and pit excavating

<sup>3</sup>The California statute and regulations treated by the District Court and the Court of Appeals as preempted by the federal Acts are California Business and Professions Code, Section 12211 (Pet. App. 69) and 4 Cal. Admin. Code, ch. 8, subch. 2, Article 5, commonly referred to as Article 5 (Pet. App. 70).

Section 12211 provides in part that the county sealer (such as Jones) shall weigh or measure packages of commodities "to determine whether the same contain the quantity or amount represented . . ." It contains the provision:

"Whenever a lot or package of any commodity is found to contain, through the procedures authorized herein, a less amount than that represented, the sealer shall in writing order same off sale and require that an accurate statement of quantity be placed on each such package or container before same may be released for sale by the sealer in writing. . . ."

Article 5 of the California regulations contains the procedure for testing lots as described above in the statement of facts.

<sup>4</sup>Amendment 10—*Reserved Powers to the States*

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

on property within its limits). The police powers of the States synchronize with the purposes of food and drug legislation in the sense, as expressed by this Court, that they "touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection . . .". *United States v. Park*, 421 U.S. 658, 44 L.Ed.2d 489, 498, 95 S.Ct. 1903, 1909 (1975), quoting from *United States v. Dotterweich*, 320 U.S. 277, 280, 88 L.Ed. 48, 64 S.Ct. 134 (1943).

Historically food products have been a prime commodity for State regulation. "If there be any subject over which it would seem the States ought to have plenary control, and the power to legislate in respect to which, it ought not to be supposed, was intended to be surrendered to the general government, it is the protection of the people against fraud and deception in the sale of food products [in this case, oleo-margarine]." *Plumley v. Massachusetts*, 155 U.S. 461, 472, 39 L.Ed. 223, 15 S.Ct. 154 (1894).<sup>5</sup>

The importance of State regulation becomes particularly apparent when it is recognized that the federal government has simply not been geared for adequate inspection. As late as 1972, according to a General Accounting Office report, food plants were inspected by the Food and Drug Administration on an average

<sup>5</sup>"Regulation of the business of supplying food and drugs, to safeguard health and prevent fraud, is a traditional common exercise of police power." 5 Witkin, *Summary of California Law* (8th ed.), 3793, and cases cited.

Chief Justice Marshall's opinion in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203, 63 L.Ed. 23, 71 (1824), is a historic statement favoring federal power in the regulation of interstate commerce. Yet, he carefully preserved state sovereignty over the inspection of "articles produced by the labor of the country" (which would implicitly include food products).



of only once every 5 to 7 years.<sup>6</sup> One can only wonder at the even smaller amount of federal inspection that takes place at the wholesale and retail levels (or possibly whether there is any federal inspection at all for weights and measures at such levels).

The breadth of State authority in a related area of human affairs was recently determined by this Court in the case of *DeCanas v. Bica*, ..... U.S. ...., 7 47 L.Ed.2d 43, 49, 96 S.Ct. .... (1976). It involved the right of the States under their police powers to regulate the employment relationship to protect workers within the State. This Court was of the opinion that California Labor Code section 2805(a) prohibiting the knowing employment of illegal aliens was within the mainstream of such police power regulations. Factors noted by the Court included the deprivation of citizens and legally admitted aliens of jobs during high unemployment, depression of their wage scales and working conditions, and the lessening of the effectiveness of labor unions.<sup>8</sup>

There are equally cogent factors in the situations at hand that bring them too within the *mainstream*

<sup>6</sup>Report No. 94-684, 94th Cong., 2d Sess., Consumer Food Act of 1976, at page 4.

<sup>7</sup>The Advance Sheets for the official report were not available at the time of this writing; therefore, specific references will be made to the Lawyers Edition report.

<sup>8</sup>In another case decided on the date of the decision in *De Canas v. Bica*, *supra*, this Court took the occasion to discuss the right of a State to inspect, under her own standards, shipments of milk from a sister State (from Louisiana to Mississippi). Milk is subject to the supervision of the Food and Drug Administration no less than flour. Although, in deciding the sole issue in the case the Court determined that, under the Commerce Clause, Mississippi could not refuse the sale of milk solely because Louisiana had failed to sign a reciprocity agreement, it commented on the rights of a State to apply her own inspection laws. As we understood the case, it was this Court's opinion that Mississippi has the right to apply

of police power regulation. To begin with, the consumer comes most readily to mind as the one who loses from a breakdown of the police powers in the field of weights and measures. However, other members of the business community are adversely affected.

For example, effective enforcement is vitally important to wholesalers and retailers. They also buy in packages, although in larger units. The baker who buys 100 50-pound sacks of flour, or the food chain that buys 100 50-pound boxes of beef, are also entitled to receive full quantity as labeled.

Failure to police shortages effectively promotes unfair competition. The packager that shorts the most forces others to lower their standards to his standard or below, and this develops into further shortages. See *Federal Trade Commission v. Sperry and Hutchinson Co.*, 405 U.S. 233, 31 L.Ed.2d 170, 92 S.Ct. 898 (1972), stating that section 5 of the Federal Trade Commission Act prohibiting "unfair methods of competition . . . and unfair or deceptive acts or practices" should be interpreted to protect both consumer and merchants against unfair competition, 405 U.S. at 240-242.

her standards of inspection to shipments of milk from a non-reciprocating State although the milk met the federal standards.

"In the absence of adequate assurance that the standards of a sister State, either as constituted or as applied, are substantially equivalent to its own, Mississippi has the obvious alternative of applying her own standards of inspection to shipments of milk from a nonreciprocating State. *Dean Milk*, *supra*, at 355, 95 L. Ed 329, 71 S Ct 295, expressly supported the adequacy of this alternative: 'such inspection is readily open to it without hardship for it could charge the actual and reasonable cost of such inspection to the importing producers and processors.'"

*The Great A. and P. Tea Co. Inc. v. Cottrell*, ..... U.S. ...., 47 L.Ed.2d 55, at 64, 96 S.Ct. .... (1976). We see no difference, in terms of applying a State's police powers, between *standards of wholesomeness* as to milk (or any food product) and *standards of weights and measures* as to bacon and flour (or any packaged commodity).



Moreover, there can be financial losses for farmers too because what the packer does not put into the package he does not buy from the farmer. As an example, when a school district buys one-million half-pint containers of milk a week, it provides a market for dairy farmers for the milk poured into the cartons. If the cartons are permitted to be one-half ounce short, there is a loss of market for about 3,800 gallons a week to dairy farmers.

In our complex society there is almost an endless number and variety of enterprises and business activities that must be protected by a weights and measures enforcement program. The problems are particularly acute in California because of the huge amount of business traffic that has accompanied the population explosion which has made California the most populous state in the nation.

Weights and measures assurance is so basic a right that it antedates our nation's Constitution, and, indeed, dates back to the Magna Carta. History indicates that the Magna Carta was forced from King John by the merchants, arising in their day because they needed protection. Merchants need protection today more than ever before.

America's wholesalers, retailers, and consumers today buy and sell on the basis of weights and measures millions of packages of merchandise, including food and other consumer products every day. The National Bureau of Standards estimates the total annual value of commerce governed by weights and measures at 900 billion dollars.<sup>9</sup>

<sup>9</sup>Hearings before Subcom. of the House Committee on Appropriations, Departments of State, Justice, and Commerce, The Judiciary, and Related Agencies, 94th Cong., 1st Sess., Commerce at 573.

The importance of weights and measures to the economy is dramatized by the multi-faceted support given to our Petition filed in this Court. The amici curiae brief prepared by the California Attorney General was submitted by two-thirds of the State Attorneys General, and was supported by the National Association of Retail Grocers of the U.S., Inc., representing the operations of 120,000 retail grocery stores, The American Farm Bureau, and the National Grange, representing the majority of America's farmers, Scale Manufacturer's Association, Inc., representing every major scale manufacturer in the United States, the National Conference on Weights and Measures, composed of weights and measures officials from every State operating under the Secretariat of the National Bureau of Standards, and other public officials, farm and business organizations, and consumer groups.

## II

### THE NINTH CIRCUIT'S INTERPRETATION OF THE FEDERAL ACTS CONFLICTS WITH THE STANDARD OF UNIFORMITY OF THE STATES.

#### A. The Ninth Circuit Has Erroneously Construed the Federal Acts as Requiring Accuracy of the Contents of Packages.

The Ninth Circuit's concept of the federal weight standard under the federal Acts and their interpretive regulations<sup>10</sup> is that the federal weight standard requires the accuracy of individual packages and pre-

<sup>10</sup>21 U.S.C. 343 [Federal Food, Drug & Cosmetic Act, 52 Stat. 1047] (Pet. App. 90).

§343. *Misbranded food*

"A food shall be deemed to be misbranded—

(a) if its labeling is false or misleading in any particular.

(e) If in package form unless it bears a label containing

(1) the name and place of business of the manufacturer,

(This footnote is continued on next page)

cludes the use of lot averaging. Accordingly, it finds a conflict with the lot averaging system of Article 5 of the California regulations. This may be the key to the lower Court's invalidation of the California statute and regulations. The Court's position is stated in the following passage in the *General Mills* opinion (Pet. App. 48):

"As explained in our *Rath* opinion, §12211 and the regulations in 4 Cal. Admin. Code ch. 8, subch. 2, evaluate compliance with net weight labeling standards solely by determining by statistical sampling techniques the average weight of

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packer, or distributor; and (2) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count: *Provided*, that under clause (2) of this subsection reasonable variations shall be permitted, and exemptions as to small packages shall be established, by regulations prescribed by the Secretary."

21 U.S.C. 601 [Federal Wholesome Meat Act, 81 Stat. 584] (Pet. App. 91).

§601. Definitions

"As used in this chapter, except as otherwise specified, the following terms shall have the meanings stated below:

(n) The term 'misbranded' shall apply to any carcass, part thereof, meat or meat food product under one or more of the following circumstances:

(1) if its labeling is false or misleading in any particular; . . .

(5) if in a package or other container unless it bears a label showing (A) the name and place of business of the manufacturer, packer, or distributor; and (B) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count: *Provided*, That under clause (B) of this subparagraph (5), reasonable variations may be permitted, and exemptions as to small packages may be established, by regulations prescribed by the Secretary."

9 C.F.R. 1.8b(q) [relating to 21 U.S.C. 343] (Pet. App. 92):

"The declaration of net quantity of contents shall express an accurate statement of the quantity of contents of the package. Reasonable variations caused by loss or gain of moisture during the course of good distribution practice or by unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large."

a lot of packages, any of which may weigh more or less than the weight stated on its label. In a sense, by refusing to recognize any of the variations permitted by 21 C.F.R. 1.8b(q), these provisions are stricter than the federal law. But §12211 only proscribes sale of lots of packages whose average actual weights are *less* than the label weights. The federal law requires 'accurate' weight, proscribing packages that are overweight as well as underweight. We recognize that step 10 of the California procedure as described in the *Rath* opinion takes variations of individual packages from accurate weight into account in determining whether lots should be ordered off sale; but these variations are evaluated solely on a statistical basis, and may be greater than, as well as less than, the reasonable variations permitted each package by 21 C.F.R. 1.8b(q) and may arise from circumstances not recognized by the federal regulation. We conclude that §12211 and 4 Cal. Admin. Code ch. 8, subch. 2, do permit the sale of packages of flour that do not comply with federal law."

Both the federal District Court and the Court of Appeals found that Article 5 is statistically valid (Pet. App. 6 and 57).

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21 C.F.R. 317.2(h)(2) [relating to 21 U.S.C. 601] (Pet. App. 93).

"The statement as it is shown on a label shall not be false or misleading and shall express an accurate statement of the quantity of contents of the container exclusive of wrappers and packing substances. Reasonable variations caused by loss or gain of moisture during the course of good distribution practices or by unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large."



**B. The Ninth Circuit's Construction of the Federal Acts Is Administratively Untenable.**

If the Federal standard is to be administered according to the Ninth Circuit's theory, that is, on the basis of individual package accuracy, then it would become necessary to apply the standard on a product-by-product basis. As a practical matter this is administratively untenable. The real subject here is not merely bacon and flour and the respective packers of such commodities, but rather thousands of products and thousands of competitors. The subject in a sense is commerce generally.

To begin with, the nature of a product is important. For example, the criteria applied to packages of spaghetti in determining "reasonable variations" will differ from those applied to canned stew. The factors would vary also according to whether the product is hygroscopic or nonhygroscopic. Moreover, "good manufacturing practices" may vary according to the location of the packaging plant. To illustrate, chocolate bars are made in Switzerland, England, France, Israel and Canada, to name just a few of the countries that export this product into the United States.

Under the Ninth Circuit's interpretation foreign competitors in hygroscopic products would have an advantage over American competitors in that foreign products could be more short weight than domestic products because of longer distances for distribution. Policing efforts are difficult enough when applied to domestic products. They would become virtually impossible of application when applied to packages packed in foreign lands.

Moreover, manufacturers with inefficient filling capabilities would have a competitive advantage over companies having more accurate systems.

To accept the interpretation of the Ninth Circuit would be to dilute the present standard of uniformity, *i.e.*, accuracy, among the states, into a multiplicity of standards throughout the land.

Furthermore, the requirement of individual package accuracy would create as many standards as there are inspectors. Obviously, this too would be incompatible with uniformity for, even with the best of faith, there would be many different judgments as to reasonableness of shortages. Equally serious would be its effect on the productivity of the state inspectors in terms of the quantity of items inspected on a package-by-package basis and the corresponding braking effect on the over-all enforcement program.

**C. California Uses a Federal Standard in Regulating Weights and Measures.**

**1. California's Article 5 Follows the Principles of Handbook 67 of the National Bureau of Standards.**

Contrary to the opinions of the Ninth Circuit, the standard used by California in its enforcement activities against the respondents is a *federal* standard.

Article 5 of the California regulations is substantially similar to, and follows the principles of, Handbook 67, published by the National Bureau of Standards, United States Department of Commerce.<sup>11</sup> Handbook 67 is a manual for weights and measures officials for checking prepackaged commodities at the retail level. The overwhelming majority, if not all, of the States either have adopted Handbook 67 as a part of their weights and measures laws or have laws and regulations authorizing [as does California] the use of lot sampling plans comparable to the lot sampling plan of Handbook 67.

<sup>11</sup>A. Gen. A.C. Brf. (Pet.) App. 3.



## 2. Background of Handbook 67.

There can, of course, be no debate on the proposition that effective governmental control of weights and measures is essential to any advanced society. Such control is not just weighing, measuring, and counting, but is actually in two parts. First is the setting of physical standards, such as the mass of the pound and the volume of the gallon; and second, is the enforcement to assure full measure.

Both parts are necessary to prevent unfair competition and fraud on purchasers, including consumers. In connection with the first of the above-stated parts, enforcement officials must know the types of scales or meters to use, the tests to determine whether measuring devices are correct, and how to use them. The entire process leads to the attainment of the ultimate objective of *full and accurate measure at the time and place of sale*,<sup>12</sup> a process that has been developed and refined in over 70 years of work by the Secretary of Commerce through the National Bureau of Standards.

Under the Bureau of Standards Act, 31 Stat. 1449, 15 U.S.C. 271 *et seq.* (March 3, 1901), the office of Standard Weights and Measures became known as the National Bureau of Standards.<sup>13</sup>

The Secretary of Commerce has been authorized under 15 U.S.C. 272 to undertake the following activities, among others:

“(5) cooperation with the States in securing uniformity in weights and measures laws and methods of inspection, and

<sup>12</sup>Are the respondents seeking a rule providing in effect that for the first time since Magna Carta of 760 years ago it is not necessary to apply a standard of accuracy *at time and place of sale*, but instead rest upon a standard of inaccuracy?

<sup>13</sup>Shortly thereafter the National Bureau of Standards was transferred from the Treasury Department to the Department

(19) the compilation and publication of general scientific and technical data resulting from the performance of the functions specified herein or from other sources when such data are of importance to scientific or manufacturing interests or to the general public, and are not available elsewhere . . . .”

Handbook 67 is an outgrowth of such authorized powers. It is the fifth in a series of Handbooks published by the Department of Commerce through the work of the National Bureau of Standards. It is “designed to present in compact form comprehensive guides for state and local weights and measures officials. . . . It presents an operational guide for the control, under law, of prepackaged commodities. . . .”<sup>14</sup>

The Handbook embodies the principle that regulatory authority for the enforcement of weights and measures laws and regulations in the United States rests with State and local jurisdictions.<sup>15</sup> The Federal government, acting through the National Bureau of Standards, provides the leadership and technical resources to State and local weights and measures officials and to “manufacturers, packagers, and consumers that will assure accuracy in commercial quantity determinations; maintain an effective system of fairness and protection for buyer and seller in all commercial transactions involving determination of quantity; promote development and application of new and improved technology in weights and measures; and remove impediments to the free flow of commerce.”<sup>16</sup>

of Commerce, under the direction of the Secretary of Commerce, 32 Stat. 826.

<sup>14</sup>Preface to Handbook 67 (A. Gen. A.C. Brf. (Pet.) App. 4).

<sup>15</sup>Hearings before Subcom. of the House Committee on Appropriations, 94th Cong., 1st Sess., Commerce at 572.

<sup>16</sup>*Id.* at 572, 573.

In the process of insuring uniformity the National Bureau of Standards sponsors the National Conference on Weights and Measures, "an organization of State and local enforcement officials and representatives of Federal agencies, business, industry, trade associations, and consumer organizations. The Conference serves as a national forum and develops and adopts model laws and regulations, technical codes, test methods, enforcement procedures, and administrative guidelines."<sup>17</sup>

### 3. The Basic Thrust of Handbook 67 and Article 5.

Handbook 67, which is comparable to California's Article 5, is a basic part of several hundred documents relating to the application of standards of accuracy of the Secretary of Commerce. Typical of such documents is Handbook 44, entitled "Specifications, Tolerances and Other Technical Requirements For Commercial Weighing and Measuring Devices," and Handbook 94, "The Examination of Weighing Equipment." The basic purpose of these Handbooks and other publications of the National Bureau of Standards is to establish standards of accuracy. Handbook 67 serves as a bridge among these many documents for putting into use the standards of accuracy for *packaged commodities*. It combines the "average" concept with random package procedure. "Perfection in either mechanical devices or human beings has not yet been attained; thus the existence of imperfection must be recognized and allowances for such imperfections must be made. These allowances are recognized in the 'average' concept."<sup>18</sup>

<sup>17</sup>Hearings before Subcom. of House Committee on Appropriations, 93d Cong., 2d Sess., Commerce at 923.

<sup>18</sup>Preface to Handbook 67, A. Gen. A.C. Brf. (Pet.) App. 5.

Under Handbook 67 individual package variations are allowed, both over and under the stated quantity, to make the packaging process compatible with good commercial packaging and distribution practices, but the average of the lot at the time of sale must equal the declared net weight, measure, or count. While the fill of an individual container may be under or over the stated net quantity, purchase of several containers, or repeat purchases of single containers, will result in full measure on the average. Individual packages are tested or inspected by a sampling procedure, involving random samples, under which the samples reflect the lot from which they were taken.

The Handbook rejects the position that *every* package must be equal to or above the labeled quantity because it is impractical and too costly for commercial packaging and distribution practice.

The Handbook does not change the accuracy requirement contemplated by the Federal Wholesome Meat Act or the Federal Food, Drug, and Cosmetic Act. It simply provides a more practical and effective method of checking packages through statistical evaluations to achieve the goal of weight accuracy.

Handbook 67 was employed by the Department of Consumer Affairs of the City of New York, as reported in *General Mills, Inc., et al. v. Furness*, 398 F.Supp. 151 (S.D.N.Y. 1974), *aff'd* 508 F.2d 536 (2d Cir. 1975),<sup>19</sup> involving the same milling companies as the respondent millers in the case at bar, who argued for preemption of federal laws. This case was ignored by the Ninth Circuit, notwithstanding that the Second Circuit found no federal preemption.

<sup>19</sup>Pet. App. 93-109.



The ordinance challenged by the milling companies in New York was Section 833-16.0 of the Administrative Code of the City of New York which provided in pertinent part:

"It shall be unlawful to sell or offer for sale any commodity or article of merchandise, at or for a greater weight or measure than the true weight or measure thereof . . ."

The District Court ruled that the ordinance as applied in accordance with Handbook 67 did not raise an irreconcilable conflict between local and federal law, and that, therefore, the New York ordinance was not preempted by federal law. "In view of a municipality's interest in regulating weights and measures, 'one of the oldest exercise of governmental power' a city must be afforded wide discretion in determining what variations from stated weights are reasonable." *Id.* at 153.

Handbook 67 could be invalidated by the decisions of the Ninth Circuit because of the following factors (all of which are present in California's Article 5):

(1) It calls for examinations of lots instead of only single packages; (2) it sets numerical limits on the overpacking and underpacking of individual packages in a lot; (3) it requires an *average* net weight or measure *per lot*; (4) it allows larger amounts of overpacking for hygroscopic products (products which may gain or lose moisture) so they will average net weight by lot at time of sale. [By comparison, under the federal standard as interpreted by the Ninth Circuit, each individual package must be judged separately and a "reasonable" amount of *shortage* allowed.]

Accordingly, if, by a parity of reasoning, the laws and regulations of States employing Handbook 67 be-

come unenforceable for reasons applied by the Ninth Circuit to California's Article 5, there will be shortages in the marketplace in a large part of America.

If the package-by-package principle of inspection, as interpreted by the Ninth Circuit, is to supersede the average concept used in Article 5 and Handbook 67, then may it be said that the Secretary of Commerce and his National Bureau of Standards have been wrong all these years? If so, then may it be asked, why has Congress continued to appropriate funds to the National Bureau of Standards to sponsor the updating of Handbook 67? In its 1975 budget request to Congress, the National Bureau of Standards stated that "Revision of the handbook for checking of package quantities for use by Federal, State and local agencies is currently under way. Statistical sampling plans are being developed in fiscal year 1974 and a draft handbook for experimental use will be produced in fiscal year 1975."<sup>20</sup> In its 1976 budget request,<sup>21</sup> the National Bureau of Standards stated that "In fiscal year 1975: (1) revision draft of Handbook 67, Checking Prepackaged Commodities, was circulated for field testing by over 1000 organizations."<sup>22</sup>

<sup>20</sup>Hearings, *supra*, before Subcom. of House Committee on Appropriations for fiscal 1975, 93rd Cong., 2d Sess., Commerce at 923.

<sup>21</sup>Hearings before Subcom. of House Committee on Appropriations for fiscal 1976, 94th Cong., 1st Sess., Commerce at 574.

<sup>22</sup>The silent acquiescence of Congress which the Ninth Circuit interprets (Pet. App. 24, 25) as supporting federal preemption based on *United States v. Shreveport Grain and Elevator Co.*, 287 U.S. 77, 77 L.Ed. 175, 53 S.Ct. 42 (1932), is really acquiescence in continuation of the long history of State enforcement, because without State laws and State enforcement, there would have been no effective enforcement possible in the United States.



If the Secretary of Commerce has been wrong all these years in rejecting the package-by-package principle of inspections, has he also been wrong in setting up a standard of weights and measures that requires accuracy at the *time and place of sale*?

If not, then the federal regulations in question<sup>23</sup> must be interpreted [if such regulations apply at all to commodities at the consumer trade level] as applying at the *time and place of sale*. And if such interpretation is correct, then there is no conflict between Article 5 and the federal regulations. The provisions of Article 5, like those of Handbook 67, are applied not by looking back into time and space, *i.e.*, looking back to the packaging plant and intermediate points of transit, but by examining the factors at the time and place of sale. To the extent that the Ninth Circuit's decisions in the lower Court's *Rath* and *General Mills* cases conflict with this principle, the Court is in error and should be reversed. The basic 2-pronged administrative practice of (1) determining the average weight of lots of commodities, and (2) examining such lots at the time and place of sale, is a *federal agency practice*, and should be upheld by this Court.

The California standard for weights and measures is at least as strict as the federal standard under the Acts in question, but it is reasonable since it follows the standard developed by the National Bureau of Standards which has withstood the test of time.

<sup>23</sup>9 C.F.R. 1.8b(q) (Federal Food, Drug, and Cosmetic Act), and 21 C.F.R. 317.2(h)(2) (Federal Wholesome Meat Act).

#### 4. An Analogous Federal Law Supports the Principle of Lot Averaging in Determining Label Accuracy.

The Federal Insecticide, Fungicide, and Rodenticide Act<sup>24</sup> is one of three major federal Acts that deal with the accuracy of weights and measures of packaged products. Section 135(a)(2)(c) providing that the package label must state "the net weight or measure of the content: Provided, that the Secretary may permit reasonable variations," is substantially similar to 21 U.S.C. 343(e) [Federal Food, Drug, and Cosmetic Act] and 21 U.S.C. 601(n)(5) [Federal Wholesome Meat Act of 1967].

The relevant portion of the Environmental Protection Agency's interpretive regulation in 40 C.F.R. 162.104

<sup>24</sup>61 Stat. 163, as amended by 78 Stat. 190, 193, 7 U.S.C. 135(a):

"It shall be unlawful for any person to distribute, sell, or offer for sale in any Territory or in the District of Columbia, or to ship or deliver for shipment from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, or to receive in any State, Territory, or the District of Columbia from any other State, Territory or the District of Columbia, or foreign country, and having so received, deliver or offer to deliver in the original unbroken package to any other person, any of the following:

(2) Any economic poison unless it is in the registrant's or the manufacturer's unbroken immediate container, and there is affixed to such container, and to the outside container or wrapper of the retail package, if there be one through which the required information on the immediate container cannot be clearly read, a label bearing—

(a) the name and address of the manufacturer, registrant, or person for whom manufactured;

(b) the name, brand, or trade-mark under which said article is sold; and

(c) *the net weight or measure of the content: Provided, That the Secretary may permit reasonable variations*" (Emphasis added).

corresponds to principles of Handbook 67 and Article 5. It states in part:

“§162.104. Interpretation with respect to statement of net contents.

(a) *Requirement of the act.* The act requires that the label of each economic poison bear a statement of the net weight or measure of the contents. . . .

(d) *Permissible variations.* (1) If the contents are stated as a minimum quantity, the package must contain at least the quantity claimed. No variation below this quantity is permitted and any variation above the contents stated must not be unreasonably large.

(2) The net content is considered to be the *average net content* unless stated as a minimum quantity. Where *average net content* is used:

(i) The *average content of the packages in any shipment* must not fall below the quantity stated and variation above the quantity stated is permitted only to the extent that it represents deviations unavoidable in good packing practice.

(ii) There must be no unreasonable variation from the *average in the content of any package* . . . .” (Italics added).

The National Bureau of Standards’ principles of sampling and lot averaging in determining label accuracy as to weights and measures are thus followed - not only by the States but also by the United States Department of Agriculture whose regulatory powers extend to the functions under the Federal Wholesome Meat Act. The Ninth Circuit erred in not recognizing

that Jones was following a federal standard in applying the provisions of California’s Article 5.

### III

#### IN ENACTING THE FEDERAL FOOD, DRUG AND COSMETIC ACT AND THE FEDERAL WHOLESOME MEAT ACT CONGRESS DID NOT INTEND TO OUST STATE AUTHORITY WITH RESPECT TO WEIGHTS AND MEASURES OF COMMODITIES.

##### A. Ouster of State Authority Should Not Be Presumed.

It is a basic proposition that conflicts between State and federal regulations are not to be sought where none exists. *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 4 L.Ed.2d 852, 80 S.Ct. 813, 78 A.L.R. 2d 1294 (1960). It will not be held that a federal statute was intended to supersede the exercise of the power of the State unless there is clear manifestation of intention, since the exercise of federal supremacy is not lightly to be presumed. *Schwartz v. Texas*, 344 U.S. 199, 97 L.Ed. 231, 73 S.Ct. 232 (1952).

The case of *DeCanas v. Bica, supra*, .... U.S. at ...., 47 L.Ed.2d 43, 50, .... S.Ct. .... (1976) contains one of the more recent expressions by this Court that only a demonstration that complete ouster of the States was “the clear and manifest purpose of Congress” would justify the conclusion that Congress intended to preempt State law. The quoted words were used in earlier years in *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146, 10 L.Ed.2d 248, 83 S.Ct. 1210 (1963), and in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 91 L.Ed. 1447, 67 S.Ct. 1146 (1947).



**B. The Legislative History of the Federal Acts Reveals the Intent of Congress to Preserve the Police Powers of the States.**

**1. Introductory.**

In *DeCanas v. Bica*, *supra*, 47 L.Ed.2d at 50, the Court stated that there was no "indication in either the wording or the legislative history of the INA that Congress intended to preclude even harmonious State regulation touching on aliens in general, or the employment of illegal aliens in particular."

Likewise the federal acts under scrutiny here reveal no intent to preclude the exercise of the police powers of the States to regulate weights and measures of commodities.

**2. Food and Drug Legislation.**

From the very outset, the purpose of food and drug legislation was in the direction of the consumer rather than the producer or packer. To fully protect the consumer the Congress needed the support of the States. This need was expressed by Congress at the inception of the modern-day food and drug legislation, in H.R. Rep. No. 2118, 59th Cong., 1st Sess., March 7, 1906:

"The bill provides that the law shall be carried out under uniform rules and regulations to be made by the Secretaries of the three departments, to wit: Treasury, Agriculture, and Commerce and Labor. . . . The officials of the National Government having charge of the enforcement of the law will cooperate with the State food, dairy, and drug officials. . . .

*It is not proposed by the bill to interfere in any way with the power of the State officials*

*over local trade, but the purpose of the bill is to give to State officials the aid of the National Government and to receive from the State officials their aid in the enforcement of the national law.*

The passage of this bill is in the interest of protecting the weak from the powerful, the poor consumer from the rich manufacturer.

The laboring man or artisan, who knows his own trade, but who may not be an expert in the quality of foods or their imitations or adulterations, is entitled to the protection of the State to the extent that when he purchases an article for the consumption of his family he receives what he pays for, and further, to know that the food which he buys and eats shall give him strength and vigor instead of containing some harmful substance or poison which, in the end, breaks down his health. What is true of such a man is true of all the rest of us. *The public is entitled to protect itself against those who would cheat and defraud it in those necessities of life where one can not tell the spurious from the genuine, either by casual examination or by consumption.*

We think it is the duty of the State to give to the public the measure of protection offered by the provisions of the bill which we have recommended for passage" (*Italics added*).

Congress thus had no intention to interfere with the police powers of the States in the field of local trade. Rather it was contemplated that both the States and the National Government were to be on the front lines concurrently in carrying out their enforcement activities and were to help each other in implementing their respective consumer protection laws.



The Congressional plan shortly after the turn of the century of a cooperative effort between the States and the federal government in protecting the consumer did in fact develop into a reality. This is evident from the report of the House Committee on Interstate and Foreign Commerce to which was referred the bill [H.R. 4071] to make certain technical amendments to sections 301(k) and 304(a) of the Federal Food, Drug and Cosmetic Act, H.R. Rep. No. 807, 80th Cong., 1st Sess., July 8, 1947. The Committee stated that the "enactment of the proposed amendments would not have the effect of excluding State authority in the same field [*Savage v. Jones*, 225 U.S. 50]. The Food and Drug Administration has worked cooperatively with the States, and the amendments are not intended to disturb that relationship. The needs for consumer protection are such as to require at least the combined efforts of federal and local authorities."

### 3. Meat Inspection.

The basic principles of the Federal Food, Drug and Cosmetic Act were reflected in the Federal Meat Inspection Act, enacted March 4, 1907, and amended by the modern-day Wholesome Meat Act of 1967, Pub. L. 90-201, 81 Stat. 584, 21 U.S.C. 601 *et seq.* (Dec. 15, 1967). "Section 409 would coordinate the Federal Meat Inspection Act with the Federal Food, Drug and Cosmetic Act by providing that the provisions of the former shall not derogate from any authority conferred by the Federal Food, Drug and Cosmetic Act prior to enactment of the bill." Sen. Rep. No. 799, 90th Cong., 1st Session, 1967 U.S. Code Cong. and Adm. News 2207.

The letter from the Secretary of Agriculture to the President of the Senate in 1967 requesting the meat

inspection legislation,<sup>25</sup> opened with the following statement: "Transmitted for consideration of the Congress is a draft of a bill to clarify and otherwise amend the Meat Inspection Act, to provide for cooperation with appropriate State agencies with respect to State meat inspection programs, and for other purposes." The Secretary described the economic climate then prevailing as being "highly conducive to the practice of adulteration, deceptive labeling and packaging and a variety of fraudulent activities," and stated that "The object of the proposed bill is to eliminate numerous opportunities now present to defraud consumers and endanger public health." A substantial explanation was given as to the cooperative Federal-State programs involved in the bill and the estimated costs. "We believe," the Secretary concuded, "that the enactment of the bill . . . is urgently needed in the interest of more adequate protection of consumers and other members of the public."<sup>26</sup>

The Congressional purposes of preventing unfair competition and thereby protecting consumers by cooperation between the Secretary of Agriculture and the States is expressed in the Act itself, 81 Stat. 587, 21 U.S.C. 602.

"The unwholesome, adulterated, mislabeled, or deceptively packaged articles can be sold at lower prices and compete unfairly with the wholesome, not adulterated, and properly labeled and packaged articles, to the detriment of consumers and the public generally. It is hereby found that all articles and animals which are regulated under this chapter are either in interstate or foreign commerce or

<sup>25</sup>1967 U.S. Code Cong. and Adm. News 2208.

<sup>26</sup>*Ibid.* at 2210.

substantially affect such commerce, and that regulation by the Secretary and *cooperation by the States and other jurisdictions as contemplated by this chapter are appropriate to prevent and eliminate burdens upon such commerce, to effectively regulate such commerce, and to protect the health and welfare of consumers*" (Italics added).

A Congressional intent to create a framework of Federal-State cooperation with respect to a meat inspection program would seem to be incompatible with an intent to restrict the States from inspecting meat food packages to protect against the evils of adulteration and short-weighting, even though the packages were packed at a federally inspected, rather than a State inspected, plant. In other words, it would be inconsistent of Congress to be protective of State inspection powers and at the same time silently take them away.

**C. The Purpose of the Federal Food, Drug and Cosmetic Act May Be Determined From the Scope and Detail of the Act.**

The three basic procedures under the Food and Drug Act of 1906, 34 Stat. 768, regarding adulterated or misbranded foods were (1) judicial criminal proceedings with fine or imprisonment as the penalties, (2) judicial libel (condemnation) proceedings with forfeiture provisions; and (3) administrative proceedings for exclusion of imports. By later amendment of the 1906 Act provision was made for inspection of seafoods. 6 *Law and Contemporary Problems* 70 (Duke Univ. School of Law, 1939).

There is no detention authority under the Act for either adulteration or short-weighting, either in or out

of the packaging plant. A reading of the Act indicates that Congress never really intended to get into enforcement at the distribution level.<sup>27</sup>

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<sup>27</sup>The entire Act is contained in chapter 9, 21 U.S.C. sections 301-392. Subchapter I, section 301, states the short title; subchapter II, sections 321 to 321(c), contains miscellaneous definitions, including definitions as to butter and milk. Subchapter III, sections 331 to 337, deals with prohibited acts and penalties, including seizures in connection with libel proceedings, but has no provisions for inspection or administrative enforcement. Seizures and the attendant libel for condemnation proceedings under the Act are normally instituted in the following classes of violations: (1) when food products contain poisonous or other harmful ingredients; (2) where food products consist of filthy, decomposed or putrid substances; (3) where foods or drugs are so grossly adulterated with false or fraudulent claims that their distribution creates a serious imposition on the public; and (4) when there are deliberate frauds in the shipment of adulterated or misbranded foods that seriously demoralize legitimate trade practices. Unless a violation falls within one of these classes, seizure action is not taken but the offender is prosecuted criminally. If the violation falls within one of the former classes and is also deliberate, both types of action may be taken: "Enforcement provisions of the Food, Drug, and Cosmetic Act," 6 *Law and Contemporary Problems* 75 (Duke Univ. School of Law, 1939). See also *Ewing v. Mytinger and Casselberry*, 339 U.S. 593, 94 L.Ed. 1088 (1949).

Subchapter IV, sections 341 to 348, is entitled "Food". It spells out the various forms of adulterated and misbranded foods, sets forth tolerances for poisonous substances and pesticide chemicals and deals with oleomargarine sales and food additives. It has no provisions for inspections or administrative enforcement. The misbranding problems with which the government was concerned were mainly problems relating to identity and ingredients of foods. 6 *Law and Contemporary Problems* 28 (Duke Univ. School of Law, 1939).

Subchapter V, sections 351 to 360, and subchapter VI, sections 361 to 364, deal with drugs and cosmetics, respectively, and have no relevance whatever to the case at bar. Subchapter VII, sections 371 to 377, contains general administrative provisions. Section 371 relates to the promulgation of regulations by the Secretary and to hearings in connection therewith. Section 372 provides that the Secretary may conduct examinations and investigations "for the purposes of this chapter", but there are no guidelines in the statute or [as we shall note *infra*] in the regulations. Section 373 involves the furnishing of records

(This footnote is continued on next page)



**D. The Federal Wholesome Meat Act Grants Express (Concurrent) Jurisdiction to the States to Prevent the Distribution of Adulterated and Misbranded Commodities.**

**1. Introductory.**

The Federal Wholesome Meat Act not only reflects a complete absence of intent to oust State authority; it in fact expressly *grants* jurisdiction to the States (*i.e.*, "concurrent jurisdiction") under the provisions

of interstate shipment. Section 374 is entitled "Inspection—right of agents to enter; scope of inspection; notice; promptness; exclusions." This section does not apply to inspection of retail stores nor to the inspection of food commodities for purposes of determining weights and measures. The purpose of the inspection can be determined from section 374(b). It states that the inspection officer must give the owner a report (with a copy to the Secretary) indicating that any food, drug, device or cosmetic (1) consists of filthy, putrid, or decomposed substance, or (2) has been prepared or held under unsanitary conditions thereby becoming contaminated with filth or rendered injurious to health. Similarly section 374(d) provides for the obtaining of samples by the inspector for the purpose of determining whether any food consists of putrid or decomposed substances or is otherwise unfit for food. It is thus quite clear that the intent or purpose of section 374 does not relate to weights and measures but rather to physical good health.

Subchapter VIII, section 381, deals with imports and exports. Finally, under subchapter IX, section 391 contains a standard separability clause, and section 392 exempts meat food products from the provisions of the Act.

The regulations set forth in 21 Code of Federal Regulations (C.F.R.) are equally void of any guidance with respect to inspection or enforcement procedures in the area of weights and measures. There are no guidelines as to prohibited acts under 21 U.S.C. section 331, or as to penalties under section 333. The regulations are silent as to seizures under section 334. Likewise there are no guidelines of value with respect to definitions or standards for food under section 341, or as to misbranded food under section 343 except for the definition of reasonable weight variations which was invalidated by the District Court and restored by the Ninth Circuit. Finally, and most significantly, there is no guidance for the inspection of foods under section 374.

of 21 U.S.C. 678,<sup>28</sup> to regulate distribution outside the "establishment" to prevent the distribution of commodities which are "adulterated or misbranded." The relevant portion of section 678 is as follows:

" . . . Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter, may not be imposed by any State or Territory or the District of Columbia with respect to articles prepared at any establishment under inspection in accordance with the requirements under subchapter I of this chapter, but *any State or Territory or the District of Columbia may, consistent with the requirements under this chapter, exercise concurrent jurisdiction with the Secretary over articles required to be inspected under said subchapter I, for the purpose of preventing the distribution for human food purposes of any such articles which are adulterated or misbranded*<sup>29</sup> and are outside of such an establishment. . . ." (Emphasis added).

The Ninth Circuit stated that it recognized the above-stated grant of concurrent jurisdiction to the States<sup>30</sup>

<sup>28</sup>Pet. App. 91, 92.

<sup>29</sup>A meat food product is "misbranded" if the label statement as to package contents is "false or misleading," 21 U.S.C. 601(n)(1) [See also 21 U.S.C. 343(a)]. Short-weighting is misbranding, 21 U.S.C. 601(n)(5) [See also 21 U.S.C. 343(e)]. Misbranding can be determined only after examining and comparing the representations on the label with the package contents. If, as indicated by the Ninth Circuit (Pet. App. 28 and 45), there is no substantial difference between "labeling," as used in the first part of section 678, and "misbranding," then the provisions of section 678 which speak of "articles which are adulterated and misbranded" are indeed redundant. Congress must not however be presumed to have performed an idle act in delineating the respective jurisdictional areas of the State and federal governments.

<sup>30</sup>A substantial body of case law that sheds light on the scope of federal and state authority where a traditional police (This footnote is continued on next page)



and the federal government. But it held that "California cannot exercise its concurrent jurisdiction through the particular standards established by §12211 and Art. 5," because, in the opinion of the Court, such Cali-

power of the state becomes concurrent with a power of the federal government was developed during the so-called Prohibition Era of the 18th Amendment and the Volstead Act, 41 Stat. at L. 305, Ch. 83, Acts 66th Cong., 1st Sess. As in the case of foodstuffs, the regulation of the traffic in liquor has long been a traditional police power of the states. *Vigliotti v. Pennsylvania*, 258 U.S. 403, 66 L.Ed. 686, 42 S.Ct. 330 (1921); *United States v. Lanza*, 260 U.S. 377, 67 L.Ed. 314, 43 S.Ct. 141 (1922). The text of the 18th Amendment was as follows:

"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Section 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation." (Emphasis added).

Section 2 of the 18th Amendment spoke of concurrent "power" of the Congress and the several states, whereas the language of 21 U.S.C. section 678 is concurrent "jurisdiction." It is reasonable to treat the two terms as synonymous.

The word "jurisdiction" has been defined to be, among other things, the "power to declare and enforce the law," 50 C.J.S. 1091. The term "concurrent powers" has been defined as political powers exercised independently in the same field of legislation by both federal and state governments. 8 *Words and Phrases*, 608 *et seq.* A "concurrent power excludes the idea of a dependent power. . . ." Mr. Justice McLean in the *Passenger Cases*, 7 How. 283, 399, 12 L.Ed. 702, 750 (1849).

In *Wedding v. Meyler*, 192 U.S. 573, 24 S.Ct. 322, 48 L.Ed. 570, 66 L.R.A. 333 (1903), and in *Nielsen v. Oregon*, 212 U.S. 315, 29 S.Ct. 383, 53 L.Ed. 528 (1908), "Concurrent jurisdiction" was given respectively to Kentucky and Indiana over the Ohio River by the Virginia Compact, and respectively to Washington and Oregon over the Columbia River by Act of Congress. It was decided that such concurrent jurisdiction conferred equality of powers, and that neither state could override the legislation of the other.

The nature of the respective powers of the state and federal governments to regulate at the local level was outlined by

fornia standards were "in addition to or different than" the federal standards.<sup>31</sup> The basic factor causing the difference between the California and federal standards, according to the Court, is the statistical sampling and the use of average weight or measure of the packages in a lot in accordance with Article 5.<sup>32</sup>

## 2. Provisions as to Concurrent Jurisdiction in 21 U.S.C. 678.

Assuming *arguendo* that the States are preempted under section 678 from imposing "marking, labeling, packaging, or ingredient requirements" (frequently lumped together as "labeling") that are "in addition to, or different than," the provisions of the Act, the preemption provision takes nothing away from the concept of *concurrent jurisdiction* granted by Congress to the States in the same section of the statute as to regulating against adulteration and misbranding.

Mr. Justice Taft in *United States v. Lanza*, *supra*, 260 U.S. 377.

In stressing that the power of the states to enforce prohibition did not originate in the 18th Amendment the court stated:

"To regard the Amendment as the source of the power of the states to adopt and enforce prohibition measures is to take a partial and erroneous view of the matter. Save for some restrictions arising out of the Federal Constitution, chiefly the commerce clause, *each state possessed that power in full measure prior to the Amendment*, and the probable purpose of declaring a concurrent power to be in the states was to negative any possible inference that, in vesting the national government with the power of countrywide prohibition, state power would be excluded . . ." (Emphasis added). 260 U.S. at page 381.

Likewise here the probable purpose of declaring, in 21 U.S.C. 678, that the states should be vested with concurrent jurisdiction at the distribution level to prevent the misbranding of packages of meat, was to "negative any possible inference" that state power [which existed long before the Federal Wholesale Meat Act] would be excluded.

<sup>31</sup>Pet. App. 29.

<sup>32</sup>Pet. App. 28 and 48.

If the supremacy of the federal government in dealing with adulteration and misbranding had been intended, thereby subordinating the longstanding police power of the States, it would have been directly declared in section 678. The Congress had the whole vocabulary of the English language to draw upon in shaping the terminology of section 678.

Assuming again *arguendo* that there is federal preemption as to labeling in section 678, such preemption has little meaning in the case at bar. Labeling is a matter of format, not of substance behind the label. Jones has not imposed any labeling requirements. He has not told the respondents what kind of label to put on their food packages, nor what to say on the label, nor what the size or style of the label should be. The respondents are not required by the State to have a label, but if they do, it must be an honest one. All Jones requires is that the label be not false, misleading or deceptive to the consumer in its statement of the net weight of the product to which the label is attached. Jones is merely enforcing the legitimate interest of the State in preventing unfair competition and ensuring that the purchaser gets the product quantity that the package label represents to him when he buys a package of bacon or flour, or any other commodity bearing a label statement as to "net weight." Jones must enforce this requirement under Business and Professions Code section 12211 to prevent misbranding.

Likewise, the State has not imposed any packaging or ingredient requirements. It has not told the respondents what kind, size or shape of package to use. Nor has it indicated what kind of ingredients to put in the package. The only basis on which the food packages

were ordered off sale was the violation of Business and Professions Code section 12211, the California misbranding statute, which prevents unfair competition and fraud on purchasers.

### 3. The Detention Provisions of 21 U.S.C. 672 Support the Grant of Concurrent Jurisdiction to the States.

Under 21 U.S.C. 672,<sup>33</sup> a meat food product is subject to Federal detention if "there is reason to believe that any such article is *adulterated or misbranded* and is capable of use as human food, or that it has not been inspected, in violation of the provisions of subchapter I of this chapter or of any other Federal law or the *laws of any State* or Territory, or the District of Columbia . . ." (Italics added). The italicized words indicate an explicit recognition by Congress of the validity of State laws with respect to adulteration and misbranding.

In *United States of America v. 500 Pounds, More or Less, of Veal and Beef*, 319 F.Supp. 966 (N.D.

<sup>33</sup>§672. "Whenever any carcass, part of a carcass, meat or meat food product of cattle, sheep, swine, goats, horses, mules, or other equines, or any product exempted from the definition of a meat food product, or any dead, dying, disabled, or diseased cattle, sheep, swine, goat, or equine is found by any authorized representative of the Secretary upon any premises where it is held for purposes of, or during or after distribution in, commerce or otherwise subject to subchapters I or II of this chapter, and there is reason to believe that any such article is adulterated or misbranded and is capable of use as human food, or that it has not been inspected, *in violation of the provisions of subchapter I of this chapter* or of any other Federal law *or the laws of any State* or Territory, or the District of Columbia, or that such article or animal has been *or is intended to be, distributed in violation of any such provisions*, it may be detained by such representative for a period not to exceed twenty days, pending action under section 673 of this title or notification of any Federal, State, or other governmental authorities having jurisdiction over such article or animal. . . ." (Italics added).



Cal. 1970), the Court construed the language authorizing detention in certain cases under Section 672:

"What are these cases? One arise when the product inspected does not violate the standards of the Department of Agriculture, but does contravene the valid rules of another federal agency, or of a *State* or Territory. In such cases, the Department is authorized by Section 672 to detain the product for a limited time to give the other jurisdiction(s) the chance to proceed against it" (*Italics added*).

A reasonable construction of section 672 is that the State laws referred to in the section include the laws concerned with adulteration (wholesomeness) and misbranding, both being parts of the same coin. Adulteration and misbranding are the central parts of both the federal and State food inspection laws involved in this proceeding. There can be little doubt, of course, that the framers of the statute were seriously concerned with the laws dealing with unwholesomeness. The language used in section 672 in reference to "dead, dying, disabled, or diseased cattle, sheep, swine, goat, or equine" is reminiscent of the horrendously unwholesome conditions existing in segments of the meat packing industry prior to the passage of the Wholesome Meat Act of 1967.<sup>34</sup>

If the framers of the Wholesome Meat Act were genuinely concerned with preserving the integrity of

<sup>34</sup>"A current Department of Agriculture survey of packing and processing facilities in non-Federal inspected meat plants shows the existence of appalling conditions. For example the report shows that contaminated meat, meat from diseased animals, hides, carcasses, animal entrails, flies, and other absolutely unsanitary and thoroughly disgusting items find their way into processed meats. The existence of such conditions is deplorable. The passage of legislation that will not eliminate all the unsanitary conditions and assure the public the highest quality of products is not meeting our full responsibility." Representative Feighnan, *Congressional Record*, 10/31/67, p. 30517.

State laws in the application of the provisions of section 672, then it stands to reason that they were equally so concerned when drafting the terms of section 678. Otherwise the use of the words "exercise concurrent jurisdiction" in section 678 is an exercise in futility and both sections 672 and 678 become meaningless. This would conflict with the fact, as derived from the legislative history, that the framers of the Wholesome Meat Act intended to preserve the responsibilities and functions of the States. The words of the federal statute are much too clear to permit an interpretation that Congress meant to preempt the laws of the States regulating the distribution of commodities to prevent the evils of adulteration and misbranding.

"A Federal-State relationship is maintained [by the bill] that closes the loopholes without infringing significantly upon responsibilities and agencies of the respective states." Senator Montoya, one of the Senate sponsors of the 1967 bill, *Congressional Record*, 10/31/67, p. 35354.

### Conclusion.

For all of the reasons stated, the decisions of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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JUL 16 1976

MICHAEL RODAK, JR., CLERK

IN THE  
**Supreme Court of the United States**

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October Term, 1975

No. 75-1053

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JOSEPH W. JONES, as Director of the County of  
Riverside, California, Department of Weights and  
Measures,

*Petitioner,*

vs.

THE RATH PACKING COMPANY, *et al.*,

*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals  
for the Ninth Circuit.**

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**BRIEF FOR RESPONDENTS.**

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IN THE  
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October Term, 1975  
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JOSEPH W. JONES, as Director of the County of  
Riverside, California, Department of Weights and  
Measures,

*Petitioner,*

vs.

THE RATH PACKING COMPANY, *et al.*,

*Respondents.*

On Writ of Certiorari to the United States Court of Appeals  
for the Ninth Circuit.

**BRIEF FOR RESPONDENTS.**

**Opinions Below.**

The Opinion of the Court of Appeals for the Ninth Circuit in the case involving respondent The Rath Packing Company ("Rath") is reported at 530 F.2d 1295 (Pet. App. 1-34);\* the Opinion in the case

\*References herein are abbreviated as follows:

a - single joint appendix

Jones Br. - brief of petitioner Jones

Pet. - Jones' petition for certiorari

App. - appendix

Br. Opp. - Rath's brief in opposition to petition for certiorari

J#1. R.T. - reporter's transcript, *Rath v. Jones*

J#1. C.T. - clerk's transcript, *Rath v. Jones*

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involving respondents General Mills, Inc., *et al.* (the "millers") is reported at 530 F.2d 1317 (Pet. App. 35-52).

The Opinion of the District Court for the Central District of California in the *Rath* case is reported at 357 F.Supp. 529 (Pet. App. 57-68); the Opinion in the millers' case is unreported *per se* but appears as an appendix to the appellate opinion at 530 F.2d 1359 (Pet. App. 53-55).

#### **Jurisdiction.**

The jurisdictional requisites are adequately set forth in Jones' brief.

#### **Constitution, Statutes and Regulations Involved.**

The pertinent constitutional provisions, statutes and regulations are:

##### **Federal.**

Constitution of the United States, Article VI, Clause 2 (supremacy clause);

Constitution of the United States, Article I, Section 8, Clause 3 (interstate commerce clause);

Constitution of the United States, 14th Amendment (due process clause);

Wholesome Meat Act of 1967, 81 Stat. 584, 21 U.S.C. section 601 *et seq.* ("Meat Act");

J#2. R.T. - reporter's transcript, *Gen. Mills, et al. v. Jones*

J#2. C.T. - clerk's transcript, *Gen. Mills, et al. v. Jones*

R.T. - reporter's transcript, *Rath v. Becker*

C.T. - clerk's transcript, *Rath v. Becker*

Calif. 39 States AC Br. - amici curiae brief of 39 states, prepared by California

Calif. 33 States AC Br. - amici curiae brief of 33 states, prepared by California in support of Jones' petition

N.Y. AC Br. - New York amicus curiae brief

Federal Food, Drug, and Cosmetic Act, 52 Stat. 1047, 21 U.S.C. section 301 *et seq.* ("FDCA");

Federal Fair Packaging and Labeling Act, 80 Stat. 1296, 15 U.S.C. section 1451 *et seq.* ("FPLA");

9 Code of Federal Regulations section 317.2(h)(2) (Pet. App. 93);

21 Code of Federal Regulations section 1.8b(q) (Pet. App. 92).

##### **California.**

Business and Professions Code, section 12211 ("§ 12211"—Pet. App. 69);

4 California Administrative Code, Chapter 8, subchapter 2, Article 5 ("Article 5"—Pet. App. 70).

#### **Questions Presented.**

Only a single question is presented by petitioner Jones, viz.:\*

"Whether enforcement provisions of the California statutes and regulations pertaining to accuracy of weights and measures [viz., § 12211 and

---

\*Rules 23 subd. 1(c) and 40 subd. 1(d), S.C.R., provide that "Only the questions set forth in the petition or fairly comprised therein will be considered by the court" and that "the brief [on the merits] may not raise additional questions or change the substance of the questions already presented. . . ." Accordingly, this certiorari is properly concerned only with the single question raised by Jones as to whether federal laws preempt one California statute (§ 12211) and one California regulation (Article 5).

This certiorari does not include any question as to the well reasoned holdings below that the federal regulations are valid (530 F.2d 1308-1312, 1323-1324; see Br. Opp. 14-18), a question raised only by California in its own unsuccessful petition

(This footnote is continued on next page)

Article 5] are preempted by Federal laws [viz., by the Meat Act as to Rath's bacon, by the FDCA and/or the FPLA as to the millers' flour] pursuant to Article 6, Clause 2 of the Constitution of the United States."

This generalized preemption question comprises the following particular questions:

1. Whether the Court of Appeals was correct in holding that the Meat Act preempts and precludes California from imposing *state* net weight labeling requirements which are "in addition to, or different than" *federal* net weight labeling requirements made under the Meat Act.

2. Whether the Court of Appeals was correct in holding that the FPLA preempts and precludes California from imposing *state* net weight labeling requirements which "are less stringent than or require information different from" *federal* net weight labeling requirements made under the FPLA.

3. Whether the Court of Appeals was correct in holding that the FDCA preempts and precludes California from imposing *state* net weight labeling requirements which "impermissibly conflict" with *federal* net weight labeling requirements made under the FDCA.

for certiorari (No. 75-1052) and smuggled into its amici curiae brief (Calif. 39 States AC Br. 48) and into the New York amicus curiae brief (N.Y. AC Br. 5); nor as to the holdings below, following *United States v. Shreveport Grain and Elevator Co.*, 287 U.S. 77 (1932), that the federal regulations form part of the federal labeling standards (530 F.2d 1314, 1324); nor as to Handbook 67, which has nothing to do with enforcement provisions of any California statute or regulation, which never has been an issue in these cases, and which is not even mentioned in the decisions below.

4. Whether the Court of Appeals was correct in holding that the specific California net weight labeling requirements in issue, viz., § 12211 and Article 5:

(a) are "in addition to, or different than" the federal net weight labeling requirements made under the Meat Act;

(b) "are less stringent than or require information different from" the federal net weight labeling requirements made under the FPLA; and

(c) "impermissibly conflict" with the federal net weight labeling requirements made under the FDCA.

#### Statement of the Case.

Respondents cannot accept the factual statements of Jones and of those amici supporting him as to the two cases under review by this certiorari, said facts being sprinkled throughout their briefs and most being without a vestige of evidentiary support in the record—the statements are not fair to the Court of Appeals, to the District Court, to the issues or to the record, and do not provide this Court with an adequate picture of the cases.

These two cases concern net weight labeling statutes and regulations (federal and California) as they pertain to two prepackaged foods, respondent Rath's meat (bacon herein) and respondent millers' flour. These two foods have two characteristics in common which make them different from the vast bulk of the "hundreds of thousands of different products" inspected by Jones (Calif. 39 States AC Br. 34)—viz., each food contains

water moisture when packaged and each food is packed in a non-hermetically sealed package (viz., not air tight). Because of these characteristics, this moisture content can and generally will change (and hence the net weight will change) after the time of packaging and shipping and before the time of sale to the consumer. These cases center upon the irreconcilable conflict between federal laws and Jones' enforcement of certain California laws in dealing with this fact of nature.

Contrary to the incessant harangue of Jones and his California amicus about "evils of short weighting", "cheat and defraud", "unfair competition", "fraud on purchasers", "truth in packaging", "protecting consumers", etc., these are not "consumer protection" cases at all. These simply are test cases where certain California officials are trying to impose a "minimum-weight" concept,\* contrary to the federal concept requiring accurate weight subject to reasonable variations from specified causes.

#### **Rath's Bacon.**

Respondent Rath is a corporation organized and existing under the laws of the State of Iowa, having its principal place of business in the State of Iowa, and is a meat processor engaged in interstate commerce and therefore subject to inspection pursuant to the terms of the federal Wholesome Meat Act of 1967

\*"Minimum-weight" concept meaning that the net contents must weigh not less than labeled net weight at the time of sale; overweight, viz., under-declaration of net contents, is permitted under this concept.

(the "Meat Act") [47a, 54a, 59a, 67a-69a]. Rath has been granted inspection by the United States Department of Agriculture ("USDA") [47a-48a, 54a, 69a]. USDA inspectors inspect the Rath establishment continuously to enforce the Meat Act and its regulations [60a, 81a, 83a] and they have access to all parts of the establishment at all times [83a, 85a].

Among Rath's meat food products is bacon, which is packaged in containers that are sold by retail stores [69a]. The facts of this case as to Rath are limited to bacon but are equally applicable to other meat and meat food products subject to the Meat Act [70a].

Part of the USDA inspection includes inspection as to the accuracy of labeled net weight of bacon, both when it leaves Rath's establishment [21 U.S.C. §607(b); 84a] and also at the retail level [21 U.S.C. §§ 672, 673; 84a].

The Meat Act sets forth various labeling requirements at 21 U.S.C. § 601(n), one such requirement (§ 601(n)(5)) providing that:

"(n) The term 'misbranded' shall apply to any . . . meat or meat food product . . . (5) if in a package . . . unless it bears a label showing . . . (B) an accurate statement of the quantity of the contents in terms of weight . . . : *Provided*, That under clause (B) of this subparagraph (5), reasonable variations may be permitted . . . by regulations prescribed by the Secretary."

Pursuant to this statute and its proviso, Title 9 Code Federal Regulations § 317.2(h)(2) provides that:



"Reasonable variations caused by loss or gain of moisture during the course of good distribution practices or by unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large."\*

Hence, the federal *statute* sets forth the basic net weight labeling requirement that each package of bacon shall bear an accurate statement of net contents, while the *regulation* authorized by the statutory proviso relaxes this literal and impossible statutory standard by recognizing reasonable variations from exact accuracy which are caused (1) by unavoidable deviations in good manufacturing practice and/or (2) by loss or gain of moisture during the course of good distribution practices.\*\*

Both of these recognized causes for reasonable variation are beyond the reasonable control of the packer. First, even under the best of good manufacturing practices, most packages will have some minor but unavoidable deviation from exact accurate weight when manu-

\*Petitioner Jones in this certiorari never has challenged validity of this regulation. Counsel for Jones told the district court, "Well, we don't challenge the validity of (h)(2) . . . Frankly, I hadn't considered whether it is valid or not. . . ." [J#1. R.T. 49]. And Jones' petition and brief herein present no question as to the Court of Appeals' holding that the regulation is valid and forms part of the definition of misbranding.

"The regulation having been made . . . in pursuance of constitutional statutory authority, it has the same force as though prescribed in terms by the statute." *Atchison, T. & S.F. R. Co. v. Scarlett*, 300 U.S. 471, 474 (1937). See, *United States v. Mersky*, 361 U.S. 431, 438 (1960).

\*\*Similar regulations are found not only under the FDCA and FPLA as to foods, drugs and cosmetics (21 C.F.R. § 1.8b(q)), but also under the FPLA as to other consumer commodities as adopted by the Federal Trade Commission (16 C.F.R. § 500.22).

factured. It would be economically impossible to manufacture each package of sliced bacon with an exact weight of one pound, no more, no less—the time and cost would be prohibitive.

Therefore, in accordance with net weight compliance procedures which always had full USDA approval [R.T. 52], Rath bacon in issue was packed within a pass zone of 10/16 ounce—centered upon a target or average weight as a midpoint [86a-87a, 89a]. Prior to the onslaught of Jones' inspections, Rath's target weight for one pound bacon was + 3/16 ounce over stated net weight [87a, 89a].\*

Second, because of its moisture content, bacon in a non-hermetically sealed package (viz., not air tight) will lose moisture after being packaged—before it leaves Rath's establishment as well as during the course of good distribution practices after it leaves the establishment [105a]. One pound of bacon will lose approximately 1/16 ounce of moisture by evaporation between the time it is packaged and weighed and the time it leaves Rath's establishment [90a-91a, 94a]. The average net weight of all bacon leaving Rath's establishment thus was greater than labeled net weight [R.T. 106]\*\*—viz., it was the weight of the aforesaid average overpack less the 1/16 ounce moisture loss between the time of packaging and time of leaving the establishment [93a].

\*Because of the off sale activities of petitioner, the target weight or overpack was changed by Rath to + 5/16 ounce on October 27, 1971, to + 7/16 ounce on January 12, 1972, and to + 12/16 ounce on March 2, 1972 [87a-88a]; at a cost to Rath exceeding \$10,000 [60a, 89a].

\*\*This is in marked contrast to Jones' argument that the federal system "is to allow *shortages* in 'reasonable' amounts for *every package* . . ." (Jones Br. 8).

Hence, the label of each package of bacon leaving Rath's establishment showed an accurate statement of net weight subject only to a reasonable variation caused by unavoidable deviations in good manufacturing practice and by moisture loss in the establishment [60a-61a]. The uncontroverted evidence was that the USDA sub-area supervisor for Southern California knew of no bacon leaving the Rath establishment during the time period in issue that was not in compliance with the net weight labeling requirements of the Meat Act and its regulations, and USDA records showed none [81a-82a]. There was no evidence that Rath had violated federal net weight standards in any way (530 F.2d 1299).

After leaving Rath's establishment, the same one pound package of bacon will continue to lose about .3 to .4 sixteenths of an ounce of moisture per day by evaporation during the course of good distribution practice [94a-95a]. Also, the wrapper of the same bacon (using a wax saturated insert board) will absorb about 5/16 ounce of moisture and grease from the bacon during such distribution [94a]. There was no evidence that any bacon in issue had been subjected to other than good distribution practice.

It is uncontroverted that the label of each package of bacon in issue always showed an accurate statement of net weight, subject only to a reasonable variation caused by unavoidable deviations in good manufacturing practice and/or by loss of moisture during good distribution practice—and thus always was in full compliance with the Meat Act.

#### **The Millers' Flour.**

Respondent General Mills, Inc. is a corporation organized and existing under the laws of the State of

Delaware, having its principal place of business in the State of Minnesota. Respondent The Pillsbury Company is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business in the State of Minnesota. Respondent Seaboard Allied Milling Corporation is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business in the State of Massachusetts [1a, 7a, 41a].

Each respondent miller manufactures, packages, labels, distributes, and introduces or delivers for introduction into commerce, wheat flours for family consumption conforming to definitions and standards of identity as set forth in 21 C.F.R. Part 15, Subpart A, promulgated pursuant to 21 U.S.C. §§ 341, 371—which allows up to 15 percent moisture by weight. Such family flours are "foods" under the Federal Food, Drug, and Cosmetic Act ("FDCA") and are "consumer commodities" under the federal Fair Packaging and Labeling Act ("FPLA") [2a, 7a, 10a, 16a, 28a-30a, 42a].

The net weight labeling of respondent millers' flours is regulated by the FDCA and the FPLA. The FDCA (21 U.S.C. §§ 331, 343) prohibits "The introduction or delivery for introduction into interstate commerce of any food . . . that is adulterated or misbranded", and provides that:

"A food shall be deemed to be misbranded . . . (e) If in package form unless it bears a label containing . . . (2) an accurate statement of the quantity of the contents in terms of weight . . . : *Provided*, That under clause (2) of this subsection reasonable variations shall be permitted . . . by regulations prescribed by the Secretary."



The FPLA similarly provides for an accurate statement of quantity on the label (15 U.S.C. §§ 1452, 1453, 1454, 1460).

Pursuant to this FDCA statutory proviso (and also under the FPLA), Title 21 Code Federal Regulations § 1.8b(q) provides that:

“Reasonable variations caused by loss or gain of moisture during the course of good distribution practice or by unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large.”\*

Hence, analogously to the Meat Act and bacon, the federal *statutes* (FDCA and FPLA) set forth the basic net weight labeling requirement that each package of flour shall bear an accurate statement of net contents, while the *regulation* (promulgated under both the FDCA and FPLA) relaxes this literal and impossible statutory standard by recognizing reasonable variations from exact accuracy which are caused (1) by unavoidable deviations in good manufacturing practice and/or (2) by loss or gain of moisture during the course of good distribution practices.

It was conceded that each package of flour in issue, when introduced or delivered for introduction into commerce by any respondent miller, bore a label containing an accurate statement of the quantity of the contents in terms of net weight [530 F.2d 1320; 35a-37a;

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\*Jones' petition and brief present no question as to the Court of Appeals' holding that the regulation is valid and forms part of the definition of misbranding. His brief to the Court of Appeals stated that he “take[s] no position on this issue” (p. 12, fn. 5).

J#2. R.T. 31-32]. At that time, the flour was comprised of about 13-14 percent moisture by weight [29a].

Flour is hygroscopic and gains or loses moisture (and hence weight) dependent on the relative humidity of the surrounding atmosphere. At relative humidities of 60% and under, it loses moisture; at higher humidities, it gains moisture. Under normal, good distribution practice, flour often is subjected to relative humidities below 60% and a loss of moisture frequently occurs [32a-34a].

Because of this hygroscopic nature of wheat flours, variations of several percent from the labeled quantity of net weight can be caused by loss or gain of moisture during the course of good distribution practice after such wheat flours are introduced or delivered for introduction into commerce [32a]. Such gain or loss of moisture has no effect on the nutritional value of the flour [35a]. By the natural course of things, this variation is more likely to occur with an increase in distribution time and resultant additional exposure to varying atmospheric temperature and humidity, as is often the case during interstate commerce.

The millers' flour has been in compliance with FDCA and FPLA net weight labeling laws at all times. Any variation from accuracy of the label statement of net weight, as supposedly found by Jones, is conceded to have been due to moisture loss during the course of good distribution practice [36a-37a; J#2. C.T. 160-161, 201-202].

#### California's Off Sale Enforcement.

The injunctions ordered by the Court of Appeals pertain only to two California statutes and three regulations thereunder [44a, 63a] and this certiorari is



even more limited, so as to include only one of these statutes (§ 12211) and only one of these regulations (Article 5) (Jones Br. 2).\*

It should be emphasized that there ~~never~~ was any evidence or issue in this case as to the laws or practices of any state other than California—and no evidence or consideration of Handbook 67. Attempts by amici supporting Jones to expand this case into a vehicle for reviewing Handbook 67, or the problems of weights and measures enforcement by 39 other states as to “hundreds of thousands of products”, are outside the record and grossly improper.

In the latter part of 1971 and the early part of 1972, Jones’ inspectors (and other counterpart county inspectors all acting under the California Director of Food and Agriculture—68a) enforcing California § 12211 and Article 5\*\* conducted concentrated inspections of bacon at retail [50a, 55a, 57a, 70a, 100a, 102a], checking not for quality or adulteration but only for the accuracy of the statement of net weight on the label [R.T. 209]. At about the same time, Jones’ inspectors also were enforcing the same laws as to packages of family flour in the possession of wholesalers and retailers [4a, 8a, 18a-26a, 43a].

Section 12211 does not follow the federal statutory concept of requiring an accurate statement of net weight at the time of shipment (subject to reasonable varia-

\*The Opinions of the Court of Appeals discuss two statutes (§§ 12211, 12607) and three regulations (Articles 5 and 5.1 of subchapter 2, and subchapter 2.1), but the petition (and hence this brief) is confined to § 12211 and Article 5.

\*\*Jones Br. 6-7, 40-41. Jones ignored other and conflicting California net weight labeling requirements set forth elsewhere in California’s Business and Professions Code and Health and Safety Code; see section IIIc *infra*.

tion caused by unavoidable deviations in good manufacturing practice) followed by recognition of moisture loss during the course of good distribution practice, but rather requires “that the average weight . . . of the packages . . . in a lot of any such commodity sampled shall not be less, at the time of sale or offer for sale, than the net weight . . . stated upon the package. . . .” Article 5, adopted to implement and enforce § 12211 and followed by Jones, provides for weighing a few samples taken from a lot (*i.e.*, 15 samples out of a lot of 300), calculating the average weight of the samples, and then “estimating” the lot average weight from the sample average weight [12a, 70a, 100a, 106a]. Article 5 allows no recognition of any variation as to any individual package in the course of calculating the average weight of the samples; once the sample average weight is calculated, Article 5 allows some “variation” for statistical purposes in “estimating” the lot average weight but the variation is solely to assure an acceptable mathematical probability of the accuracy of the estimation [108a]. If the estimated lot average is “less” than labeled net weight, then the whole lot is ordered off sale. Article 5 tells nothing as to which packages in a lot are the underweight packages—thus, overweight and accurate weight packages are ordered off sale along with everything else. The system of § 12211 and Article 5 is admittedly simple—but the problem is that it is grossly different from the concept of the Meat Act, the FDCA and the FPLA.

Section 12211 and Article 5 make no distinction between products that lose moisture and those that do not (530 F.2d 1300-1301; 108a); neither § 12211 nor Article 5 allows any recognition of net weight

variations caused either by unavoidable deviations in good manufacturing practice or by gain or loss of moisture during good distribution practice.

According to Jones, his California enforcement standard was "accuracy on the average of the lot at the time and place of sale" (Jones Br. 4, 7). However, as recognized in Jones brief (p. 4) and California's AC brief of 39 states (pp. 10, 37, 40, 43, 63), off sale orders are not issued if the lot average is overweight.\* Thus, Jones' standard really is *minimum* weight on the average of the lot at the time and place of sale. If the inspector estimated that the average net weight of the lot was "short weight" even by as little as 2/10ths of 1/16th of an ounce (less than 1/10 of 1%), all packages in the lot [including exact weight and overweight packages—J#2. C.T. 73, 75] were ordered off sale — with no consideration as to the cause of the short weight [97a-98a, 100a-101a] and with no recognition whatsoever of any reasonable variation as required by the federal regulations (530 F.2d 1300-1301).

As to Rath's bacon, no consideration was given to whether the packages had left the plant in compliance with the Meat Act [101a]\*\* nor to the kind of distribution practice that the bacon had been subjected to after leaving Rath's plant [100a-101a], nor to whether the short weight was the result of loss of moisture during the course of good distribution practice [101a-

\*California's AC Brief of 39 States, at p. 43, argues "nor does it make sense to be compelled to order off-sale overweight packages".

\*\*As Jones' counsel admitted, "When [the inspector] takes packages off the shelf at Von's market in Riverside he does not know what that package weighed at the plant. He has no idea. He couldn't care less." [J#1. R.T. 55].

102a, 103a, 105a, 106a, 108a]—and yet loss of moisture by evaporation during the course of distribution was a primary reason why these inspectors (using the Article 5 weighing procedure) found short weight in Rath's bacon at retail [61a-62a, 98a-99a]. In short, the bacon was ordered off sale by Jones at a time when it was in full compliance with the net weight labeling requirements of the Meat Act. According to the Meat Act (21 C.F.R. §§ 317.1(c), 317.12) net weight labeling or relabeling must be done under federal inspection, hence packages of bacon ordered off sale could not be relabeled as to net weight by the wholesaler or retailer and so were returned to Rath, thereby effectively making it a total loss (in excess of \$10,000) to Rath [92a, 90a].\*

Similarly, as to the millers' flour, if the inspector estimated that the average net weight of the lot was below the labeled net weight, all packages (including exact weight and over-weight packages) were ordered off sale with no consideration as to the cause of the estimated short weight [18a-26a]—i.e., no consideration was given to the fact that the packages had left the millers' mills with a net weight equal to labeled net weight, nor to the fact that the estimated short weight simply was the result of loss of moisture during the course of good distribution practice. The requirements being imposed by Jones permitted no variation from labeled net weight caused by loss or gain of moisture during the course of good distribution practices or by unavoidable deviations in good manufacturing practice. Again, in short, Jones' inspectors were ordering

\*Jones' argument (Jones Br. 4) that a lot marked off sale could be rectified by finding and removing short weight packages is unsupported in the record and is false.



"off sale" packages of family flour possessed and owned by wholesalers and retailers which were in full compliance with the applicable net weight labeling requirements of the FDCA and the FPLA. The flour wholesaler or retailer likewise is precluded by law from altering the labeled net weight (*i.e.*, from 5 pounds to 4 pounds, 15½ ounces) since family flour is required by California Business and Professions Code Section 13000 to be labeled in specified full pound sizes. Accordingly, the wholesaler or retailer returned the packages of flour to a respondent miller, who thereby absorbed losses exceeding \$10,000 [39a-41a].

The net weight variations underlying the off sale orders were trivial. In the case of bacon, it was an average of less than 4/16 ounce in a one pound package—or less than 2% [96a-97a]. In the case of flour, the average variation was in the range .125 percent to 1.78 percent by weight [36a; J#2. C.T. 160-161, 201-202]. And the variations were of nothing but water!

Further, at least in the case of Rath's bacon, the California weighing procedure for net weight determination is different from the USDA weighing procedure and, whether the two procedures are applied to the same bacon simultaneously or at different times, the differences between the two procedures can lead to a different conclusion as to whether the bacon is accurately labeled [96a, 98a, 107a-108a]. For example, the USDA procedure for net weight determination is to subtract from gross package weight the weight of a dry wrapper ("dry tare") [83a, 95a]. In contrast, the California procedure for net weight determination is to subtract from gross package weight not only the weight of the dry wrapper but also the

weight of any of the product (*i.e.*, moisture and grease) absorbed into or retained on the wrapper ("wet tare") [95a, 102a-103a]. The California procedure of subtracting the wet tare leads to a net weight determination for a pound of bacon of approximately 5/16 ounce less than the USDA procedure using the dry tare [95a-96a]. The average "short weight" for which Rath's bacon was ordered off sale [4/16 ounce—97a] thus was less than the 5/16 ounce net weight difference resulting from the difference in weighing procedures alone.\*

Another feature of § 12211 and Article 5 which should not be overlooked is that the law does not provide for a hearing or review at any time whereby the respondents or a wholesaler or retailer can challenge the accuracy of a particular net weight inspection or the propriety of a particular off sale order. The inspectors admittedly make mistakes in their weighings and/or calculations and thus issue off sale orders erroneously (104a)—but there is absolutely no redress when this happens.

### Summary of Argument.

The foods in issue, meat and flour, contain moisture and are packaged in non-hermetically sealed packages. Accordingly, they will lose moisture (and hence weight) between the time they are shipped by the manufacturer

\*Such different conclusions between federal and Article 5 weighing procedures also can result from the fact that the California inspector is sampling at retail a different lot than the USDA inspector was inspecting at the establishment. Example: suppose the USDA inspected and passed 1000 packages, 700 of which were overweight and 300 of which were underweight, all because of unavoidable deviations in good manufacturing practice; and also suppose that the latter 300 were all shipped to one store and inspected there as a lot by Jones; Jones would order them off sale, thereby negating the federal system.



and the time they are purchased in the retail store by the consumer. Manifestly, since the actual net weight of a package of either of these foods thus is continuously changing weight, the labeled net weight can be made accurate (viz. equal to actual net weight) at only one point in time. The basic irreconcilable conflict (albeit not the only one) between the federal laws on one hand, and California's § 12211 and Article 5 on the other hand, is that they designate different times when this accuracy is required to occur.

The Meat Act (regulating meat) and the FDCA and the FPLA (both regulating flour) uniformly provide that the labeled net weight shall be accurate at the *time of shipment* (subject only to reasonable variations caused by unavoidable deviations in good manufacturing practice); each then further provides for recognition of reasonable variation thereafter caused by loss or gain of moisture during the course of good distribution practice.

In stark contrast, section 12211 and Article 5 provide that the labeled net weight shall be accurate (more precisely, equal to or less than the actual net weight) at the *time of sale to the consumer*—and recognize no variation caused by unavoidable deviations in good manufacturing practice or by loss or gain of moisture in the course of good distribution practice. This necessarily means that the labeled net weight must be inaccurate at the time of shipment—specifically, the labeled net weight at time of shipment must be an underdeclaration of actual net weight (that is, there must be an intentional overpack to some indeterminate extent)—which, in turn, means that the system of section 12211 and Article 5 is different from, and hopelessly conflicts with, the system of the federal acts.

This difference and conflict can be resolved only by finding preemption of net weight labeling by the federal acts, and by enjoining application of § 12211 and Article 5 to the foods in issue. Moreover, the Meat Act contains an express preemption against state “labeling . . . requirements in addition to, or different than” the federal requirements; and the FPLA contains an express preemption against state laws that “provide for the labeling of the net quantity of contents . . . which are less stringent than or require information different from” the federal requirements—section 12211 and Article 5 obviously contravene each of these express preemption clauses.

A national uniform standard for net weight labeling has been legislated by Congress; section 12211 and Article 5, when they are applied to the foods in issue, frustrate and defeat the Congressional objective; the decisions below correctly enforce the Congressional objective by holding section 12211 and Article 5 unenforceable as to the foods in issue. The decisions are correct and should be affirmed.

## ARGUMENT.

### I

#### PREEMPTION.

The Rath and flour cases were covered in a single petition by Jones under Rule 23 subd. 5, S.C.R., as involving "closely related questions" of federal preemption under the supremacy clause of the United States Constitution, but each involves different federal laws and thus requires separate and distinct consideration.

**a. The Wholesome Meat Act of 1967 Preempts and Precludes California From Imposing State Net Weight Labeling Requirements Which Are "In Addition To, Or Different Than" the Meat Act's Net Weight Labeling Requirements.**

Under the Constitution of the United States, Article VI, Clause 2, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land. . . ."

One kind of federal preemption of an area of Law, and hence the states' exclusion from that area, is when "the Congress has unmistakably so ordained" (*Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142, rehear. den. 374 U.S. 858 (1963)).

The Meat Act is an instance of such express preemption as to the imposition of additional or different *labeling requirements* on meats and meat food products which are in or substantially affect interstate commerce,\* in that it provides:

"Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those

\*The exclusive regulation of an industry by a federal agency, when part of the industry's sales are intrastate and part are

made under this chapter may not be imposed by any State. . . ." (21 U.S.C § 678).

The validity of this express "clear and complete" preemptive provision of 21 U.S.C. § 678 heretofore has been upheld by the Sixth Circuit in *Armour and Company v. Ball*, 468 F.2d 76, 85 (6th Cir. 1972), cert. den. 411 U.S. 981 (1973).

In fact, Jones has repeatedly and unequivocally conceded that the foregoing provision of § 678 constitutes preemption of the imposition of labeling requirements [J#1. C.T. 83, 89; J#1. R.T. 26, 29-31]:

"The foregoing statutory language makes it clear, and Jones concedes, that the federal government has preempted the field of regulating the marking, labeling, packaging, or ingredient requirements of packaged meat food products." [J#1. C.T. 89].\*

Thus, there is no question that California *cannot* impose labeling requirements on Rath's bacon which are "in addition to, or different than" the labeling requirements of the Meat Act. Therefore, the only

interstate, is well established (*Mulford v. Smith*, 307 U.S. 38, 47 (1938); *Campbell v. Hussey*, 368 U.S. 297, 298-299 (1961)). " . . . in areas that Congress decides require national uniformity of regulation, Congress may exercise power to exclude *any* state regulation, even if harmonious." (*DeCanas v. Bica*, ..... U.S. ...., 47 L.Ed.2d 43, 51 fn. 7 (1976)).

\*"Mr. Keir: Yes. Section 678 puts marking, labeling, packaging or ingredient requirements all into one bag. And it says in substance there, and we concede, that the Federal Government has preempted these functions." [J#1. R.T. 31].

"[Mr. Keir] We have freely conceded, your Honor, that the Federal Government has pre-empted the field as to labeling." [J#1. R.T. 26].

"The Court: So certainly that area, that misbranding area, if you want to call it misbranding, that misbranding area has been preempted."

"Mr. Keir: Right." [J#1. R.T. 30-31].



question presented in the *Rath* case is the definition of “labeling requirements”—viz., whether “labeling requirements” include requirements as to the accuracy of the statement of net weight on the label.

“Labeling” is defined to include all written or printed matter on the package (21 U.S.C. § 601(p)). The labeling requirements of the Meat Act originate in 21 U.S.C. § 601(n), and each requirement is imposed by saying that a meat or meat food product is “misbranded” if its label does not meet the requirement. Those labeling requirements which pertain to the accuracy of statements of net weight on the label are set forth in § 601(n)(5) and 9 C.F.R. § 312(h)(2):

“(n) The term ‘misbranded’ shall apply to any . . . meat or meat food product . . . (5) if in a package . . . unless it bears a label showing . . . (B) an accurate statement of the quantity of the contents in terms of weight . . . : *Provided*, That under clause (B) of this subparagraph (5), reasonable variations may be permitted . . . by regulations prescribed by the Secretary.” (21 U.S.C. § 601(n)(5)).

“Reasonable variations caused by loss or gain of moisture during the course of good distribution practices or by unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large.” (9 C.F.R. § 312(h)(2)).

Jones’ argument that “Labeling is a matter of format [“type size, location”; “display and graphics”], not of substance behind the label” (Jones Br. 40), is untenable.\* His quote (Jones Br. 32-33) from the

\*The Court of Appeals charitably characterized this argument as “strained” (530 F.2d 1314, fn. 25).

Secretary of Agriculture’s 1967 letter, saying that the Meat Act was intended to prevent “deceptive labeling”, hardly shows labeling to be only a matter of format—prevention of deception is clearly a substantive requirement of accuracy. In fact, the first of the Meat Act’s labeling requirements (21 U.S.C. § 601(n)(1)) is that “labeling” not be “false or misleading”—unequivocally establishing that labeling is a requirement of substance, not just of format. A review of the many other labeling requirements in § 601(n), which likewise are requirements of substance and not of format, confirms the absurdity of Jones’ argument.\* Even New York’s amicus curiae brief (p. 5) recognizes that the Meat Act provides “for net weight labeling” and “require[s] ‘accurate’ labeling”.\*\*

The Meat Act thus imposes a net weight labeling requirement that every package bear a statement of net weight which is accurate except for a reasonable variation caused by unavoidable deviations in good manufacturing practice and/or by loss of moisture during the course of good distribution practice. Any meat or meat food product whose label does not meet this requirement is defined to be “misbranded”—the Meat Act uses “misbranded” synonymously and interchangeably with “mislabeled”, see 21 U.S.C. § 602.

\*Jones’ carelessness in argument also is exemplified by contrasting his assertion that “The respondents are not required by the State to have a label . . .” (Jones Br. 40) with Business and Professions Code § 12024.5 requiring “. . . any person . . . that packs any commodity . . . in any package which is intended for retail, shall mark the net weight of the commodity therein upon the package.”

\*\*Jones equally applies the same “format” argument to labeling requirements of the FPLA, notwithstanding Senate Report No. 1186 (89th Cong., 2d Sess.) stating “regulations promulgated under the act shall supersede State law only to the extent that the States impose *net quantity of contents labeling requirements* which differ . . . .” (Emphasis added).



Since the Meat Act literally defines "misbranded" as a term describing a failure to meet any of the Meat Act's numerous labeling requirements, the courts below correctly held that the express federal preemption of labeling requirements included a preemption of defining what is misbranded (530 F.2d 1314 fn. 25). The district court put it about as succinctly as possible: "Common sense tells us that mislabeling and misbranding are synonymous terms." (357 F.Supp. 529, 535 fn. 4).

As is already evident from the statement of facts, the problem with § 12211 and Article 5 is that they impose additional and different labeling requirements as to net weight. Instead of following the federal requirement that each package bear an accurate statement of net weight subject only to reasonable variation caused by unavoidable manufacturing deviations and/or by moisture loss during distribution, the § 12211/Article 5 requirement is minimum weight on the average at the time of sale. This is a wholly different net weight labeling requirement, a wholly different definition of misbranding.

Section 678 of the Meat Act does give the states "concurrent jurisdiction" to the following extent:

"any State . . . may, consistent with the requirements under this chapter, exercise concurrent jurisdiction with the Secretary . . . for the purpose of preventing the distribution . . . of any such articles which are . . . misbranded and are outside of [the packing plant] . . ."

but this "concurrent jurisdiction" is expressly limited to preventing distribution of an article which is "misbranded" within the definition of the Meat Act. Con-

trary to Jones' argument that the decisions below "oust State authority with respect to weights and measures of commodities" and "restrict the States from inspecting meat food packages to protect against . . . short weighting" (Jones Br. 9, 34), California is free to exercise "concurrent jurisdiction" with the Secretary to prevent distribution of a "misbranded" article—but California must start out by adopting the same definition of "misbranded" as does the Secretary.\* California cannot impose a net weight labeling requirement which is "in addition to, or different than" the net weight labeling requirements of the Meat Act by effectively imposing a definition of "misbranded" which is "in addition to, or different than" the definition of the Meat Act—yet, this is exactly what California's § 12211 and California's Article 5 do\*\* and that is why the courts below have enjoined their application (530 F.2d 1314).

Because of the failure of § 12211 and Article 5 to recognize any variation caused by unavoidable deviations in good manufacturing practices and/or by gain or loss of moisture during the course of good distribution practices, and because of the "minimum-weight on the average at time of sale" requirements of § 12211, Jones is ordering Rath's bacon off sale for violating the net weight labeling requirements of § 12211 and Article 5 although the bacon is in full compliance with net weight labeling requirements of the Meat Act—an indicia of federal-state conflict and the Meat

\**Armour and Company v. Ball*, 468 F.2d 76, 84 (6th Cir. 1972), cert. den. 411 U.S. 981 (1973).

\*\*Jones uses the definition of misbranded, and a range of tolerances based only on statistical sampling considerations, set forth in Article 5 [J#2. C.T. 22; Pet. 6; Jones Br. 40-41].

Act's preemption.\* The only way Rath could meet Jones' requirement of minimum weight on the average at time of sale would be by inaccurately labeling net weight at the time of shipment so as to deliberately under-declare actual net weight (viz., by overpacking), which would be a variation from accurate labeling for a non-recognized cause and thus a violation of the Meat Act. This is another indicia of federal-state conflict and the Meat Act's preemption.\*\*

**b. The FPLA Preempts and Precludes California From Imposing State Net Weight Labeling Requirements That "Are Less Stringent Than or Require Information Different From" the FPLA's Net Weight Labeling Requirements.**

The FPLA is another instance of express preemption as to net weight labeling requirements in that it provides:

"It is hereby declared that it is the express intent of Congress to supersede any and all laws of the States . . . insofar as they may now or hereafter provide for the labeling of the net quantity of contents of the package of any consumer commodity covered by this chapter which are less

\*" . . . we think to permit such regulation as is embodied in this statute is to permit a state . . . to destroy rights arising out of the Federal statute which have accrued . . . to . . . the shipper, and to impair the effect of a Federal law which has been enacted under the Constitutional power of Congress over the subject." (*McDermott v. Wisconsin*, 228 U.S. 115, 133-134 (1913).)

\*\*"A holding of federal exclusion of a state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce. . . ." (*Florida Avocado Growers v. Paul*, 373 U.S. 132, 142-143 (1963). See *Northern States Power Co. v. State of Minn.*, 447 F.2d 1143, 1146 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972).

stringent than or require information different from the requirements of section 1453 of this title or regulations promulgated pursuant thereto." (15 U.S.C. § 1461).\*

Citing the FPLA, Jones again concedes the "controlling jurisdiction of the federal government with regard to labeling" (Jones Pet. 13 fn. 5). Section 1461 expressly points out that the subject matter which is preempted is the "labeling of the net quantity of contents", thereby negating California's argument that the preemption is only as to labeling "format" ("type, size or color") (Calif. 39 States AC Br. 31-32).

Significantly, Jones' petition did not list the FPLA as a federal statute to be involved in any certiorari—and Jones' brief makes no mention of the FPLA other than to state that this proceeding arises under it (p. 4). Jones literally has taken no issue with the Court of Appeals' holding of preemption of § 12211 and Article 5 by the FPLA, or with its reference to S. Rep. No. 1186, 89th Cong., 2d Sess., May 25, 1966, that section 1461 was intended to provide expressly for the superseding of state "net quantity of contents labeling requirements which differ from requirements imposed under the terms of the [FPLA]" (530 F. 2d 1325). Hence, the parties hereto agree that California *cannot* impose net quantity labeling requirements on the millers' flour which are "less stringent than" or which "require information different from" (viz., "differ from") the net quantity labeling requirements of the FPLA. Respondents contend that the *amici curiae* should not be permitted to inject a question

\*This is a preemption of "net contents" regulations (*Atlantic Ocean Products, Inc. v. Leth*, 292 F.Supp. 615 (D. Ore. 1968), *aff'd*, 393 U.S. 127 (1968)).



of the FPLA preemption into this certiorari when Jones has failed to do so.

As section 1461 provides, the net weight labeling requirements of the FPLA are to be found in "section 1453 . . . or regulations . . ." These net weight labeling requirements of the FPLA are as follows:

"(a) No person . . . shall distribute or cause to be distributed in commerce any packaged consumer commodity unless in conformity with regulations . . . which shall provide that—

- (1) The commodity shall bear a label . . .;
- (2) The net quantity of contents (in terms of weight, . . .) shall be separately and accurately stated . . . upon the principal display panel of that label." (15 U.S.C. § 1453).

The net weight labeling regulation which provides these § 1453 requirements is 21 C.F.R. § 1.8b(q):

"(q) The declaration of net quantity of contents shall express an accurate statement of the quantity of contents of the package. Reasonable variations caused by loss or gain of moisture during the course of good distribution practice or by unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large." (21 C.F.R. § 1.8b(q)).

The reasonable variation provisions of this regulation clearly are a proper exercise of the authority granted the Secretary of Health, Education and Welfare under § 1454 to exempt a consumer commodity from full compliance with the exact accuracy requirement of § 1453 because the nature of the commodity, or some

other good and sufficient reason, makes such compliance impracticable or not necessary for adequate consumer protection. In fact, these variations were assured during hearings before the House's Committee on Interstate and Foreign Commerce [J#2. C.T. 257].\*

The FPLA labeling requirement as to net quantity of contents thus is that the label of every package shall bear a statement of net weight which is accurate except for a reasonable variation caused by unavoidable deviations in good manufacturing practice and/or by gain or loss of moisture during the course of good distribution practice. This labeling requirement is preemptive of any California net weight labeling requirement that is either less stringent or different. The "information" required by the FPLA as to the net contents of a sack of flour is its accurate weight, subject to the prescribed reasonable variations, when introduced into commerce, *i.e.*, 5 lbs.; whereas the information required to comply with California's § 12211 and Article 5 for the same sack would be 4 lbs. 13.6 oz., assuming exposure to low relative humidity caused a 3% weight loss during good distribution practice.

California's § 12211 and Article 5 impose net quantity labeling requirements that (1) are less stringent than the FPLA, because they permit overweight and also recognize a statistical variation that the FPLA does not, and (2) require information different from the FPLA, because they require minimum weight on the average at time of sale instead of accurate weight

\*Moreover, § 1460 provides that nothing contained in the FPLA shall be construed to supersede the FDCA—a clear rebuttal of California's argument that the FPLA does not allow adoption of "reasonable variation" regulations to products covered by both acts (Calif.-39 States AC Br. 27, fn. 24).



at time of shipment with recognition of specified variations—which is the standard under the FPLA and its regulation.

By requiring minimum weight on the average at time of sale, § 12211 and Article 5 inherently require under-declaration of net weight (overpacking) at the time of shipment—but the amount of the overpacking would vary from packer to packer in accordance with their varying guess-timates of prospective moisture loss. The consumer thus would be hamstrung in trying to compare price with weight among different brands at retail, because the actual net weights would differ from labeled net weights by varying amounts from brand to brand. Section 12211 and Article 5 thus frustrate the Congressional objective under the FPLA of “facilitat[ing] value comparisons” (15 U.S.C. § 1451). In contrast, the federal system implements the § 1451 goal of “accurate [label] information as to the quantity of contents” by requiring each package to be accurately labeled at the time of shipment (subject only to reasonable variation from unavoidable deviations in good manufacturing practice)—subsequent moisture loss during distribution will be consistent from brand to brand and the consumer can make a meaningful value comparison at retail.

Since § 12211 and Article 5 impose net quantity labeling requirements that are both less stringent than, and require information different from the FPLA, the courts below properly have enjoined their application. Jones is ordering flour off sale as violating the net weight labeling requirements of § 12211 and Article 5 when it is in full compliance with the net weight labeling requirements of the FPLA—and the only way to meet Jones’ requirements is to overpack instead of showing an accurate statement of net weight as

required by the FPLA. Such federal-state conflict would require a holding of preemption even without the FPLA’s express preemption.

**c. The FDCA Preempts and Precludes California From Imposing State Labeling Requirements That “Impermissibly Conflict” With the FDCA Labeling Requirements.**

The question of whether the FDCA preempts § 12211 and Article 5 as to net weight labeling can be determined by ascertaining whether these California laws interfere with, or frustrate, or conflict with, the operation of the net weight labeling requirements of the FDCA.\*

If there is such interference, frustration or conflict, then there is preemption of this limited area of net

\*“Of course, even absent such a manifestation of congressional intent to ‘occupy the field,’ the Supremacy Clause requires the invalidation of any state legislation that burdens or conflicts in any manner with any federal laws. . . .” (*DeCanas v. Bica*, ..... U.S. ...., 47 L.Ed.2d 43, 50 fn. 5 (1976)).

Preemption “depends upon whether the state regulation ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,’ *Hines v. Davidowitz*, 312 U.S. 52, 67. . . .” (*Florida Avocado Growers v. Paul*, 373 U.S. 132, 141 (1963)).

“But where the United States exercises its power of legislation so as to conflict with a regulation of the state, either specifically or by implication, the state legislation becomes inoperative and the federal legislation exclusive in its application.” (*Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 156 (1942)).

“. . . to the extent that the state law interferes with or frustrates the operation of the acts of Congress, its provisions must yield to the superior Federal power given to Congress by the Constitution.” (*McDermott v. Wisconsin*, 228 U.S. 115, 132 (1913)).

“If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress. . . .” (*Savage v. Jones*, 225 U.S. 501, 533 (1911)).

weight labeling—withstanding that food laws and net weight labeling laws may be traditionally within the police power of the state.\*

The labeling requirements of the FDCA which pertain to net weight are set forth in 21 U.S.C. § 343 and 21 C.F.R. § 1.8b(q):\*\*

“A food shall be deemed to be misbranded— . . .

(e) If in package form unless it bears a label containing . . . (2) an accurate statement of the quantity of the contents in terms of weight . . . : *Provided*, That under clause (2) of this subsection reasonable variations shall be permitted . . . by regulations prescribed by the Secretary.” (21 U.S.C. § 343).

“The declaration of net quantity of contents shall express an accurate statement of the quantity of contents of the package. Reasonable variations caused by loss or gain of moisture during the course of good distribution practice or by unavoidable deviations in good manufacturing practice

\*“. . . it is equally well settled that the state may not, under the guise of exercising its police power or otherwise, . . . enact legislation in conflict with the statutes of Congress passed for the regulation of the subject. . . .” (*McDermott v. Wisconsin*, 228 U.S. 115, 131-132 (1913)).

“Congress legislated here in a field which the States have traditionally occupied. . . . So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. . . . Such a purpose may be evidenced in several ways . . . the state policy may produce a result inconsistent with the objective of the federal statute.” (*Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

\*\*The labeling provisions of federal food and drug laws are not matters of format, but matters of accuracy—i.e., to assure that the weight of contents is “correctly stated”, that the goods are “truly labeled”. (*McDermott v. Wisconsin*, 228 U.S. 115, 130, 133 (1913)).

will be recognized. Variations from stated quantity of contents shall not be unreasonably large.”\* (21 C.F.R. § 1.8b(q)).

Again, because § 12211 and Article 5 fail to recognize any variation caused by unavoidable deviations in good manufacturing practice and/or by gain or loss of moisture during the course of good distribution practices, Jones is ordering the millers’ flour off sale for violating these California net weight labeling requirements even though the flour is in full compliance with the net weight labeling requirements of the FDCA—and the only way to meet Jones’ requirement of minimum-weight at retail would be for the millers to ship their flour with net weight intentionally under-declared (viz., overpacked) by the amount of maximum possible moisture loss during good distribution practices, which would be a clear conflict with the FDCA requirement for an accurate statement of net weight. Jones’ off sale orders are conflicting with, and frustrating, the intent of Congress.

## II

### CALIFORNIA’S § 12211 AND ARTICLE 5 ARE DIFFERENT FROM, AND CONFLICT WITH, FEDERAL NET WEIGHT LABELING REQUIREMENTS.

Both the Court of Appeals and the District Court found as a fact that the net weight labeling requirements of § 12211 and Article 5 are different from federal net weight labeling requirements (530 F.2d 1300-1301). “Defendants here do not, in any sense of the

\*The “question presented” by petitioner does not dispute the holding in the decision below that this regulation, having been duly promulgated, is an integral part of the FDCA net weight labeling requirement (530 F.2d 1324).



word, pretend to be applying federal statutory standards." (357 F.Supp. 535).

Jones asserts that the net weight labeling requirement of § 12211 and Article 5 is of "accuracy on the average of the lot at the time and place of sale" (Jones Br. 7); however, since § 12211 prohibits only average net weight that is *less* than the labeled net weight and since Jones takes no action against overweight lots (Calif. 39 States Br. 10, 40, 43, 63), the true § 12211/Article 5 net weight labeling requirement is minimum weight on the average throughout distribution and extending to the time of sale to the consumer.

The federal statutory requirements (sans regulations) are accurate weight—not minimum weight on the lot average. Hence, the requirement of § 12211 and Article 5 is different from and in conflict with the federal requirements if only the federal statutes are considered (9a).

Both the Court of Appeals and the District Court found that the net weight labeling requirements of § 12211 and Article 5 contain no provision for recognition of reasonable variation caused either by unavoidable deviations in good manufacturing practice or by gain or loss of moisture during the course of good distribution practice (530 F.2d 1300-1301, 1314); the federal regulations require such recognition. Hence, the requirements of § 12211 and Article 5 are different from and in conflict with the federal requirements when the federal regulations are considered along with the federal statutes.

The labeling requirements of Article 5 do recognize variations to compensate for sampling error inherent

in the statistical and averaging approach used by Article 5; such variations are not recognized by any of the federal statutes or regulations.

Finally, both the Court of Appeals and the District Court found that "the California inspectors employed a different weighing method" than the federal weighing method (530 F.2d 1299), this difference alone accounting for more supposed short weight as to bacon than the average short weight alleged to exist by Jones.

In summary, the federal concept is that each package of the foods in issue shall be accurately labeled as to net weight when shipped (except for unavoidable deviations in good manufacturing practice), and that thereafter loss of moisture during good distribution practice shall be recognized. In contrast, the § 12211/Article 5 concept is that the foods in issue shall be overpacked when packaged,\* to an extent that any "lot" thereof found in a retail store shall then have an average net weight not less than labeled net weight—with no recognition of variation from manufacturing deviations or moisture loss. The relative merits of the two concepts may be arguable, but the differences and the conflict are not.

These differences contravene the express preemption provisions of both the Meat Act and the FPLA, as well as conflict with, and frustrate the intent of Congress under these federal acts. These differences also give

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\*But not even Jones knows by how much, since no one knows how long it will be before the package is sold [C.T. 184-185]. Moreover, as discussed more fully in the Amicus Curiae brief filed below on behalf of the United States by the Department of Justice, this alternative of indefinite and voluntarily selected overpacks has the disadvantage for the consumer that he no longer can accurately compare price with weight, from brand to brand, because the overpacks will not be uniform among brands (Br. Opp. App. 18-21).



rise to an impermissible conflict with the FDCA. As the amicus curiae brief of New York correctly recognizes, "This conflict frames the issues before the Court." (N.Y. AC Br. 4). The outcome of the conflict is determined by the Supremacy Clause—the federal requirements must prevail.\*

The federal laws preempt and preclude California from imposing different and/or conflicting labeling requirements. Section 12211 and Article 5 are different and conflicting—hence, the courts have enforced the federal laws by enjoining imposition of § 12211 and Article 5. It is as simple as that. If California wants to enact and enforce requirements that are not different and conflicting, it is free to do so (530 F.2d 1314).\*\*

\*The actual enforcement procedure of California's § 12211 and Article 5 also was challenged by respondents as a violation of procedural due process (Constitution of the United States, 14th Amendment. See: *In re Murchison*, 349 U.S. 133, 136 (1954); *Shields v. Utah Idaho Central R. Co.*, 305 U.S. 177, 182 (1938); *Phillips v. Commissioner of Internal Revenue*, 283 U.S. 589, 596-597 (1930)). The "off sale" order issued by Jones' inspector at the time of inspection requires the merchant to remove such packages from his shelves immediately. Since the merchant cannot re-label the packages, they are eventually returned to the manufacturer (Rath or a miller), who has no recourse but to accept them and reimburse the merchant for his loss. Neither the manufacturer nor the merchant is given any hearing or other chance for a defense before the "off sale" order deprives the right to sell the flour; neither is given any hearing or review after the "off sale" order; and neither has any remedy at all as to an "off sale" order which has been made illegally or incorrectly. This "kangaroo court" administrative procedure, which deprives the merchant of his property right to sell respondents' products and which gives no one any chance for a hearing or redress, is a deprivation of property without due process of law as to both the merchant and respondents. The availability of a court review of the over-all off sale procedure by a writ of mandate or a declaratory relief action, such as is transpiring in this very case, provides no due process review or hearing because it will never reach the merits of any particular off sale order with which Rath and the millers have been confronted.

\*\*Notwithstanding California's assertions that the decisions below set a standard that can "absolutely not" be enforced

### III

#### THE DECISIONS BELOW ENFORCE THE CONGRESSIONAL INTENT OF NATIONAL AND UNIFORM NET WEIGHT LABELING REQUIREMENTS.

The petulant theme of Jones' Brief, and of California's 39 State amici curiae brief, is composed of wholly unsupported factual allegations that enforcement of the federal net weight labeling requirements is too difficult for state inspectors,\* and that the federal enforcement agencies are incapable of doing their job\*\*—and of a plea that Jones therefore should be allowed to rush in and fill the alleged vacuum.

and that "there is no way in which the States can enforce these federal regulations" (Calif. 39 States AC Br. 45, 52) and Jones' assertion that they set a standard "of complete impracticality" and "an impossible task" (Jones Br. 8), California already has adopted as of June 1, 1976 an interim emergency regulation entitled Article 5.2 that purports to comply with those decisions.

\*"the task is one of complete impracticality"; "to apply the [federal] standard on a product-by-product basis . . . is administratively untenable"; "without State laws and State enforcement, there would have been no effective enforcement possible in the United States" (Jones Br. 8, 18, 25 fn. 22). "There is no way a weights and measures inspector can know the manufacturing capabilities and procedures or practices of . . . packagers"; "there is no sound reason why . . . the weights and measures inspector should be forced . . . to determine whether the shortages found were 'reasonable'"; "making determinations of what is 'good manufacturing practice' [is] difficult, if not impossible" (Calif. 39 States AC Br. 45, 52).

\*\*"There is little weights and measures inspection by federal officials . . . and even less enforcement"; "self regulation . . . rather than governmental enforcement, prevails in the FDA system"; "the federal government has simply not been geared for adequate inspection" (Jones Br. 7, 11). "FDA simply does not have the staff to do the job"; "FDA's record of enforcement of even federal adulteration standards has been less than adequate"; "guess about what USDA might do if it had trained and equipped personnel"; "the FDA and USDA are ill-prepared to implement these shared objectives as their enforcement staffs are minimal and without either adequate training or necessary equipment" (Calif. 39 States AC Br. 46, 64, 67).

Aside from the fact that such a theme is no answer to the Supremacy Clause, the theme is false—the federal scheme is workable and works, and has served the country well with a uniform standard for many years.\*

**a. Recognition of Reasonable Variations Caused by Unavoidable Deviations in Good Manufacturing Practice Is Practical and Essential.**

Recognition of reasonable variations caused by unavoidable deviations in good manufacturing practice is practical and essential. Even Jones concedes, "Accuracy in each package is too expensive to be compatible with good manufacturing and distribution practice." (Jones Br. 7). Handbook 67 agrees that "Perfection in either mechanical devices or human beings has not yet been attained; thus the existence of imperfection *must* be recognized and allowances for such imperfection must be made." (Calif. 33 States AC Br. App. 5).

However, Jones complains that the federal system requires different variations for different products, "that the federal standard must vary depending upon the product involved", that it becomes "necessary to apply the standard on a product-by-product basis", and "The factors would vary also according to whether the product is hygroscopic or nonhygroscopic" (Jones Pet. 21; Jones Br. 18). Of course this is all true, and it should be that way. Bacon has a pass zone of 10/16 ounce because it is hard to achieve an exact pound with approximately 20 slices of bacon; on the other hand, flour is particulate

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\*The USDA made it clear in one of the state court cases that the USDA does not need, and has not sought, any help from California in taking short weight meat food products off sale at the retail level (Br. Opp. App. 1-5).

and can be measured sufficiently accurately that Jones did not dispute that each flour package in issue was accurate weight when shipped by the millers. Handbook 67 agrees that "The decision as to the unreasonableness of an error, though of necessity arbitrary, must be made and may be predicated, to a certain extent, on knowledge. Consideration should be given to . . . (4) the susceptibility of the packaged commodity to accurate weight control at the time of packaging . . . the inspector must exercise greater liberality in the determination of the reasonableness of errors in packages containing large individual elements" (Calif. 33 States AC Br. App. 15).

California's argument that "making determinations of what is 'good manufacturing practice' [is] extremely difficult, if not impossible" (Calif. 39 States AC Br. 52) has no evidentiary support whatever in the record. The record shows only that variations from such cause are not recognized by California inspectors. And the reason is not because of any insurmountable difficulty but simply because § 12211 and Article 5 allow no such recognition.

From the days of the 1914 regulations under the Federal Food and Drug Act of 1906, as amended in 1913, the federal requirement has been to recognize this kind of variation but to require that it "shall be as often above as below the marked quality".\* In short, the federal law has required accuracy-on-the-average at the time of shipping, with any individual package's variation from accuracy (over or under) to stem only from unavoidable deviations in good manufacturing practice. Thus, the manufacturer packs full weight.

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\*530 F.2d 1311.



California conflicts with the federal law first as to the timing, arguing with the FDA's election to gauge accuracy at the time of shipping and saying instead "that FDA's discretion . . . should be exercised to facilitate full net quantity and accurate statement of net weight [on the average *at the time of sale*] to the consumer. . . ." (Calif. 39 States AC Br. 19, 21 fn. 18; Jones Br. 7). Section 12211 and Article 5 also conflict as to the cause of any recognized variation, recognizing nothing for unavoidable deviations in good manufacturing practice but allowing variation for the statistical purpose of assuring a supposedly accurate relationship between the average weight of the samples and the average weight of the lot.

Section 12211 and Article 5 clearly are in conflict with federal law and are frustrating the Congressional intent.

**b. Recognition of Reasonable Variations Caused by Gain or Loss of Moisture in the Course of Good Distribution Practice Is Practical and Essential.**

Recognition of reasonable variations caused by gain or loss of moisture in the course of good distribution practice is practical and essential, and also has been part of federal law since the regulations of 1914.\* As Handbook 67 says, "Certain packaged products distributed through the normal packer-to-distributor-to-retailer channel are subject to gain or loss of weight through the increase or decrease in moisture content, beginning immediately after the packaging occurs." (Calif. 33 States AC Br. App. 7).

\*530 F.2d 1311.

As Handbook 67 further points out, enforcement of this variation is well within the capability of an experienced inspector:

"It is admitted that such indefinites as 'ordinary and customary exposure' and 'good distribution practice' are difficult to set forth quantitatively; thus the experience and judgment of the inspector must be relied upon. He will learn to compare various environments and various systems of distribution and storage. As the result of his experience he will be able to develop procedures for conducting a sound investigation that will result in the building up of a working knowledge as to what is 'customary exposure' and what may be considered to be 'good distribution practice' with respect to the packages of an individual commodity that may gain or lose weight through gain or loss of moisture." (Calif. 33 States AC Br. App. 7-8).

There is no evidentiary support for Jones' contention that there is any difficulty in recognizing variations caused by moisture loss in the course of good distribution practice. The record shows only that variations from such cause are not recognized by California inspectors. And the reason again is simply because § 12211 and Article 5 allow no such recognition.

It is obvious that a package which is accurately labeled as to net weight when shipped by the manufacturer, and which thereafter gains or loses moisture during the course of good distribution practice, will have some variation above or below net weight when



sold to the consumer. On the other hand, it is equally obvious that if the same package is to be accurately labeled at the time it is sold to the consumer, it must have some intentional variation above or below accurate net weight when shipped by the manufacturer—although not even Jones knows which or by how much because no one knows what conditions the package will be subjected to before it is sold nor for how long [C.T. 184-185, 236-237]. These two alternatives are mutually incompatible. And whichever alternative was selected, the consumer will pay accordingly—no lawsuit is going to furnish the consumer something for nothing. As discussed more fully in the Amicus Curiae brief filed with the Court of Appeals on behalf of the United States by the Department of Justice, the federal alternative of accurate weight at time of shipment (with recognition of specified variation) has the advantage for the consumer that he can accurately compare price with weight, from brand to brand, because the packs would be uniform among brands (Br. Opp. App. 18-21).

From another standpoint, a law requiring an accurate statement of net weight would be unconstitutional as violative of substantive due process\* if it did not recognize reasonable variations caused by moisture loss during the course of good distribution practice. This was the decision of the Court of Criminal Appeals of Texas in *Overt v. State*, 260 S.W. 856 (Tex. 1924), with an opinion so well reasoned and persuasive that it is set forth in Appendix 1 hereto. See also *United*

\*The 14th Amendment to the Constitution of the United States provides "nor shall any State deprive any person of . . . property, without due process of law". The California Constitution has an identical provision in Article I, Section 13, Clause 6.

*States v. The Merchants Biscuit Co.* (D.Colo. 1924), *Decisions of Courts in Cases Under the Federal Food and Drugs Act*, p. 1129.

The time for accuracy (subject to manufacturing deviations) can be when shipped by the manufacturer or when sold to the consumer—but it cannot be both. Federal law selects the former time; § 12211 and Article 5 select the latter and allow no recognition of any variation caused by loss of moisture during the course of good distribution practice. Section 12211 and Article 5 thus clearly are in conflict with federal law and are frustrating the Congressional intent.

**c. California and Many Amici Curiae States Have Their Own Statutes and Regulations Recognizing Reasonable Variations Caused by Unavoidable Deviations in Good Manufacturing Practice and/or by Gain or Loss of Moisture During the Course of Good Distribution Practice.**

Jones argues that it is impractical or impossible for his inspectors to enforce the federal standard requiring recognition of reasonable variations caused by unavoidable deviations in good manufacturing practice and/or by gain or loss of moisture during the course of good distribution practice. The absurdity of this argument is that, in fact, California has laws requiring Jones to do exactly this.

Jones' office as county sealer is created by Section 12200\*, Article 2, Chapter 2, Division V, California Business and Professions Code—the same Article 2 contains the enforcement section 12211 in issue. Both

\*"§12200. *County sealer; appointment; term; expenses; deputies; employees; inspectors.* There is in each county the office of county sealer of weights and measures. . . ."

section 12200 and section 12211 were adopted in 1939, being derived from statutes of 1913. Article 5 was adopted under the authority of § 12211, effective January 1961. Following a practice extending back many years, Jones' inspectors have conducted their net weight labeling inspections using Article 5 procedures to estimate average net weight of the lot—and issuing off sale orders under the authority of § 12211, oblivious to more recent California laws on the same subject.

In 1969, following passage of the FPLA in 1966, California adopted its own Fair Packaging and Labeling Act.\* In doing so, the California legislature expressly recognized the preemption of the FDCA and FPLA as to net weight labeling requirements by providing that:

“The sale of any commodity packaged in a container, wherein both the container and the contents thereof comply with any act of Congress or rules or regulations promulgated thereunder, appertaining to weight . . . does not violate the provisions of this chapter; . . .” (Cal. Bus. & Prof. Code § 12612)

“If any provision of this chapter is less stringent or requires information different from any requirement of [FPLA] or of any regulation promulgated pursuant to such act, the provision shall be inoperative to the extent that it is less stringent or requires information different from any such federal requirement, in which event each such federal requirement, is a part of this chapter.” (Cal. Bus. & Prof. Code § 12613).

\*Sections 12601-12615, Chapter 6, California Business and Professions Code.

As Jones alleges,\* his net weight determinations and off sale orders took place solely under § 12211 and Article 5—Jones simply ignored the “hands off” admonition of the aforesaid section 12612, and likewise ignored 12613 whereby the California legislature was telling him that the FPLA “reasonable variation” regulation had become a part of California law.

In 1970, California also adopted its present Food, Drug, and Cosmetic Law.\*\* The California legislature recognized the preemption of the net weight labeling requirements of the FDCA and FPLA by providing that:

“All labels of foods . . . shall conform with the requirements of the declaration of net quantity of contents of [FPLA] and the regulations adopted pursuant thereto. . . .” (Cal. Health and Safety Code § 26430).

“All regulations . . . pertaining to foods . . . pursuant to the [FPLA] shall be the regulations of this state. . . . No regulations shall be adopted which are contrary to the labeling requirements for the net quantity of contents required pursuant to [FPLA] and the regulations adopted pursuant to that section.” (Cal. Health and Safety Code § 26438).

“Any food is misbranded if it is in package form, unless it bears a label containing all of the following information:

\* \* \*

“(b) An accurate statement of the quantity of contents in terms of weight . . .

\*Jones Br. 40-51; Jones Pet. 6.

\*\*Sections 26000-26851, Division 21, California Health and Safety Code.



"Reasonable variations from the requirements of subdivision (b) shall be permitted. . . ."\*  
(Cal. Health and Safety Code § 26551).

Regulations under this statute provide:

"(k) Where the statement [of the quantity of the contents] does not express the minimum quantity:

(1) Variations from the stated weight or measure shall be permitted when caused by ordinary and customary exposure, after the food is introduced into intrastate commerce to conditions which normally occur in good distribution practice and which unavoidably result in change of weight or measure:

(2) Variations from the stated weight, measure, or numerical count shall be permitted when caused by unavoidable deviations in weighting, measuring, or counting individual packages which occur in good packing practice. But under subdivision (2) of this paragraph, variations shall not be permitted to such extent that the average of the quantities in the packages comprising a shipment or other delivery of the food is below the quantity stated, and no unreasonable shortage in any package shall be permitted, even though overages in other packages in the same shipment or delivery compensate for such shortage.

"(1) The extent of variations from the stated quantity of the contents permissible under para-

\*Directly flouting this statutory requirement is California's argument that "there is no sound reason why . . . the weights and measures inspector should be forced . . . to determine whether the shortages found were 'reasonable'." (Calif. 39 States AC Br. 45).

graphs . . . (k) of this regulation . . . shall be determined by the facts in such case." (17 Cal. Adm. Code, Chap. 5, Subchap. 2, Group 1, Art. 3, § 10805(k), (l).)

Falling within California's description of being "resistant to change and relying upon outmoded practices" (Calif. 39 States AC Br. 19), Jones ignores these more recent California laws requiring recognition of the same reasonable variations as the FDCA and FPLA.\*

Also in 1970, California adopted its own Meat and Poultry Inspection Act, for meat subject only to intrastate commerce.\*\* Following the pattern set by the Meat Act, the California legislature again recognized the same reasonable variations:

"A livestock or poultry product is misbranded unless it bears a label showing all of the following:

\* \* \*

(b) An accurate statement of the quantity of the product in terms of weight, . . .

"The director may permit reasonable variations. . . ." (Cal. Agr. Code § 18782).

Regulations under this statute provide:

"900. *Adoption of Federal Regulations.* . . . regulations of the United States Department of Agriculture governing meat and meat products

\*All California laws on net weight labeling should be read together and mutually construed. "It is clear that 'all acts *in pari materia* are to be taken together, as if one law'. . . . [T]hat these two acts are *in pari materia* is plain. Both deal with precisely the same subject matter. . . ." (*United States v. Stewart*, 311 U.S. 60, 64 (1940)). See also *Gleason v. Stern*, 81 Cal. 217, 221 (1889).

\*\*Sections 18650-18931, Part 3, Chapter 4, California Agricultural Code.



inspection . . . Title 9, Part 301 et seq. . . . are adopted by reference as regulations of the Director. . . ." (3 Cal. Admin. Code, Chap. 2, Subchap. 4, Article 1, § 900).

Most, if not all, of the other 39 amici curiae states likewise have, in their own state laws, a requirement recognizing reasonable variations from accuracy in statements of net weight labeling as to hygroscopic foods.\* For example, the amicus brief of New York sets forth its own state law permitting "variations from the declared weight . . . when caused by ordinary and customary exposure to conditions that normally occur in good distribution practice and that unavoidably result in change of weight" (N.Y. AC Br. 14-15); and then has the temerity to criticize the comparable federal requirement by arguing "when an inspector discovers variations, how is he or she to determine whether they were caused by gain or loss of moisture, or by some other factor" (N.Y. AC Br. 9). Similarly, New York complains that the federal regulations do not set "forth any objective standards to measure the reasonableness of permitted variations", ignoring the fact that New York state law likewise sets forth no measure of the variations it permits (N.Y. AC Br. 8, 14-15). Amici curiae can hardly argue rationally to this Court that the federal standard is too difficult to enforce, when their own state legislatures are setting the same standard.\*\*

\*See Appendix 2 hereto.

\*\*Contrary to another lament of the amici states, the decisions below do not void all statistical sampling systems *per se*. They void Article 5 because its statistical goal is to estimate whether the average net weight is less than labeled net weight, a goal which is not the federal test; the decisions below said nothing about invalidity of a statistical sampling system if its statistical

**d. Handbook 67 Is Irrelevant.**

Jones' assertion that "California, like the overwhelming majority, if not all, the states, uses the principles of the National Bureau of Standards *Handbook 67* for inspecting packages commodities" (Jones Br. 6) is in error and is wholly devoid of evidentiary support in the record. Jones' inspections did not use *Handbook 67*. There was no evidence as to the laws or practices of any state other than California and absolutely nothing to show any uniformity among state systems. There was no evidence or consideration of *Handbook 67* at all.

No state other than California uses § 12211 or Article 5; § 12211 and Article 5 have nothing to do with *Handbook 67*; there is no evidence as to how, if at all, *Handbook 67* is used by any state; *Handbook 67* never was in evidence and never even was the basis of argument until the petitions for certiorari. The decisions below say nothing of *Handbook 67*. Whether "*Handbook 67* prescribes enforcement procedures which are not in conflict with or different than the federal regulations" (N.Y. AC Br. 10) is not an issue to be decided in this certiorari.\*

goal was to estimate whether each package bore an accurate statement of net weight subject to reasonable variation from the two specified causes, which goal would be the federal test.

\**Handbook 67* calls for recognition of variations caused by unavoidable deviations in good manufacturing practice and by loss or gain of moisture during the course of good distribution practice—but it does not say how much variation is to be allowed for either cause. Accordingly, whether any state's usage of *Handbook 67* satisfies the federal acts will depend, *inter alia*, upon whether that state can meet its burden of proof that the respective amounts of variation allowed by that state for any given commodity are reasonable. See *United States v. Kraft Phenix Cheese Corporation*, 18 F.Supp. 60, 62 (S.D. N.Y. 1936).

Handbook 67, issued in 1959, claims to be nothing more than a "guide" for weights and measures officials (Calif. 33 States AC Br. App. 3). It does not purport to be "a federal standard . . . by the Secretary of Commerce" (Jones Br. 9)—moreover, the authority to regulate labeling under the federal acts in issue is given to the USDA and to the Department of Health, Education, and not to the Department of Commerce.

Handbook 67 is materially different from Article 5. First, Handbook 67 provides for recognition of net weight variations caused by moisture loss occurring during the course of good distribution practices (Br. Opp. App. 27-28) and notes that "The Model Regulation provides that 'variations from the stated weight or measure shall be permitted when caused by ordinary and customary exposure \* \* \* to conditions which normally occur in good distribution practice and which unavoidably result in change of weight or measure.' The distribution point after which such shrinkage losses are permitted is a statutory or regulatory provision that varies among the states."\* In fact, the author of Handbook 67 testified before the district court in *General Mills, Inc., et al. v. Furness*\*\* that proper application of Handbook 67 recognizes variations from moisture loss as *additional* to the variations allowed by the tabulation in the Handbook (Br. Opp. App. 31-36). In contrast, California does not recognize variations caused by moisture loss. California admits that its laws are not designed to "determine the *cause* of a discrepancy from label weight" (Calif. 33 States AC Br. 15).

\*See, i.e., Model State Packaging and Labeling Regulation 1975 (Br. Op. App. 37-38).

\*\*398 F.Supp. 151 (S.D.N.Y. 1974), aff'd 508 F.2d 536 (2d Cir. 1975).

Handbook 67 recognizes that "the experience and judgment of the inspector must be relied upon" in "the building up of a working knowledge as to . . . what may be considered to be 'good distribution practice' with respect to the packages of an individual commodity that may gain or lose weight through gain or loss of moisture" (Br. Opp. App. 27-28). California, to the contrary, concedes that it is "impossible" for an inspector enforcing Article 5 to determine the cause of a net weight variation or to determine whether it is reasonable (Calif. 33 States AC Br. 16).

Second, Jones concedes that "Under Handbook 67 individual package variations are allowed, both over and under the stated quantity, to make the packaging process compatible with good commercial packaging and distribution practices" (Jones Br. 23), and Handbook 67 recognizes that even "greater liberality" must be exercised in determining the reasonableness of variations caused by good manufacturing practice in "packages containing large individual elements", such as slices of bacon (Br. Opp. App. 29-30). In contrast, California gives no recognition at all to net weight variations caused by unavoidable deviations in good manufacturing practice. Jones says "there is no way a weights and measures inspector can know the manufacturing capabilities and procedures or practices of the hundreds of thousands of domestic packagers. . . ." (Jones Br. 45). However, the USDA and FDA inspectors manage to do this and Handbook 67 admonishes that this kind of inspection should be done by "trained specialists who concentrate on this type of work" (Calif. 33 States AC Br. App. 6).

Considering the differences between Handbook 67 and Article 5 on the very points in issue, it is inexcusable



for petitioner to represent that "The methods employed under Article 5 and Handbook 67 preserve the single national standard of accuracy. . . ." (Jones Pet. 8-12, 21-23).

**e. General Mills, Inc., et al. v. Furness Is Not in Conflict With the Decisions Below.**

There is no conflict between the decision below and any matter (Handbook 67 or otherwise) that was involved in the Second Circuit affirmance (without any opinion) of *General Mills, Inc., et al. v. Furness*, 398 F.Supp. 151 (S.D.N.Y. 1974), aff'd 508 F.2d 836 (2d Cir. 1975) (Jones Pet. App. 95-109). First, *Furness* has no relevancy to the Rath case since it did not deal with the Wholesome Meat Act of 1967 and never considered the express preemption clause of 21 U.S.C. § 678. As Jones says, "Section 678 has no counterpart in the Federal Food, Drug and Cosmetic Act" (Jones Pet. 19).

Second, the district court in *Furness* observed that "Both the city ordinance and federal regulation permit reasonable variations caused by loss of moisture during the course of good distribution practice." (Jones Pet. App. 97, 105-106); and held that the federal action was premature because the city ordinance imposed no penalty except as adjudged by a state court action—an action wherein the manufacturer could attempt to show that its product was entitled to even more variation (in amount) than had been allowed by the inspector (who was using Handbook 67 solely as a guide)—and such state court action had not yet even been filed (Jones Pet. App. 108). Section 12211 and Article 5, in marked contrast, recognize absolutely no such variation whatsoever.

Third, the pleadings in *Furness* show that every package had been separately weighed, which California says its inspectors cannot take the time to do (Jones Br. 7; Calif. 39 States AC Br. 36, App. 2 n. 1)—there was no sampling or averaging in *Furness*.

The point that Jones refuses to understand is that the preemption is as to imposition of state net weight labeling requirements that are *different* from federal net weight labeling requirements. The court in *Furness* felt that the state enforcement had not proceeded far enough to show whether there was a difference between New York City and federal requirements; the difference between California and federal requirements is uncontroverted.

**Conclusion.**

The federal system, as to both bacon and flour, requires that each package label bear an accurate statement of net weight, subject to reasonable variations caused by unavoidable deviations in good manufacturing practice and/or by gain or loss of moisture in the course of good distribution practice. Jones, enforcing § 12211 and Article 5, does not recognize any variation for either cause and imposes a "minimum weight on the lot average" system.

If Jones is allowed to enforce California net weight labeling requirements which are different from federal requirements, then any other state likewise may enforce its own requirements which are different from either California or federal requirements. The end result would be a myriad of different requirements and a balkanization which would preclude either Rath or the millers from manufacturing food for more than one state at



a time. This would be an undue interference with interstate commerce.\*

On the other hand, if every manufacturer's bacon or flour is subjected to the same federal net weight label requirements when it leaves the establishment (which is the last time the manufacturer can control it—91a-92a), then every customer will get the same amount of nutritional substance when the package is purchased—the only weight difference will be due to non-nutritional moisture loss. This will “facilitate value comparisons”, one of the objects of the FPLA.\*\*

Congress has recognized the problems inherent in accurate net weight labeling of moisture-bearing foods, and has legislated and preempted accordingly. So long as all manufacturers are held to the same standard, neither any respondent nor any other manufacturer has an advantage over competitors—and the consumer is fully protected. And the single uniform federal standard promotes interstate commerce—which underlies each of the foods in issue.

All that the decisions below have done, of which petitioner complains, is to establish preemption and to void § 12211 and Article 5. For each of the reasons set forth herein, it is respectfully submitted that the decisions of the Court of Appeals are correct and should be affirmed.

Respectfully submitted,

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GIBSON, DUNN & CRUTCHER,  
*Attorneys for Respondents.*

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\*Constitution of the United States, Article I, Section 8, Clause 3.

\*\*15 U.S.C. 1451.

## APPENDIX 1.

"The facts in this case show that the correct weight of the sack of flour was plainly marked on the sack when put up by the miller on January 2, 1924. The amount of moisture content was then  $13\frac{1}{2}$  per cent, same being within the federal limitation. . . . Said sack was kept 23 days in a dry warehouse and sold. Its moisture content by ordinary evaporation had diminished 1 per cent. Its weight was 7 ounces less when sold. Its food value, however, was unchanged. It is manifest that each day of the 23 during which the sack was in the warehouse, there was a change, however slight, in the weight of said sack of flour. Within limits peculiar to flour such weight would increase or diminish each day as the surrounding atmosphere be wet or dry. This announcement involves no legal principle, and is but the statement of a fact established by science and known to all men. What we have said of flour would seem to apply to all articles of food and foodstuffs put up and sold in packages not air tight; and to attempt to penalize him who sells, offers for sale, or exposes for sale a package of such stuff, because it has not plainly marked on the container the exact weight of the package, would be to place before any dealer in such stuffs his choice of being punished often and continually, or else going out of business. There appear in this law no tolerances, no variations, . . . . It appears inevitable that the dealer in such articles would perforce have to weigh each package in his store every day

and put thereon a new brand after each weighing, setting out the weight as of that day, according to whether the contents of such package had been increased or diminished in weight by the absorption or evaporation of moisture.

"It seems to us that we need carry the argument no further. The statement of the facts carries with it its own irresistible conclusion against the soundness of this law. The condition referred to would be intolerable. The sale in this country of such stuffs in packages is imperative. The restrictions and conditions attempted to be imposed by this law are harsh and oppressive to such an extent as to render it practically incapable of enforcement and violative of the Fourteenth Amendment to the federal Constitution. . . ."

*Overt v. State*, 260 S.W. 856, 858.

## APPENDIX 2.

In light of the anomalous fact that California and New York (who authored the two amici briefs supporting Jones) are criticizing the federal "reasonable variation" regulations while their own state laws contain the very same provisions, counsel for respondents has endeavored to ascertain how many of the other amici states might be in the same boat. Subject to some possible error occasioned by the difficulty of obtaining the current laws of all these states, it appears that *each* of the amici states has such laws on its own books! The citations are as follows:

Alabama, Title 2, Chapter 36, §612;

Alaska, Title 17, Chapter 20, §17.20.040—  
7AAC 15.580 (G)(i)(ii);

Arizona, Title 36, Chapter 8, §36-906 (4)(b)—  
Title 41, Chapter 15, §41-2065 A. 18;

Arkansas, Title 82, Chapter 11, §82-1111 (e)  
(2)—Title 79, Chapter 2, §79-220 (2)(a);

Colorado, Title 25, Article 5, §25-5-411 (f)(II)  
—Department of Health General Regs. for  
Food and Commodities §1.8 b(q);

Delaware, Title 6, Chapter 51, § 5118(2)(a)—  
Title 6, Chapter 51, §5118 (2)(a);

Florida, Title XXXI, Chapter 500, §500.11  
(5)(b)—Rules and Regs. of Florida, Chap-  
ter 5F-1, 5F-1.19 (1)(2);

Georgia, Title 42, Chapter 42.3, §42-311 (e)  
(2)—Rules of Georgia Department of Agri-  
culture Weights and Measures 40-15-3-.12  
(1)(2);



Hawaii, Title 19, Chapter 328, §328.10 (5)  
b—Hawaii Wts. and Meas. Rule 20.000/  
486-71, §§20.111.1.1, 20.111.1.2;  
Idaho, Title 37, Chapter 1, §37-123 (e)(2);  
Illinois, Chapter 56½, §411 (e)(2)—Chapter  
147, §124(a);  
Kansas, Chapter 65, §65-665 (e)(2)—KAR  
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Missouri, Chapter 196, §196.075 (5)(b);  
Montana, Title 27, Chapter 7, §27-711—MAC,  
Title 16, 16-2.14 (2)-S14210;  
Nebraska, Chapter 89, Art. 1, §89-187 (16);  
Nevada, Title 51, Chapter 585, §585.350 (6)  
(b)—Title 51, Chapter 581, §581.360;

New Hampshire, Title X, Chapter 146, §146:5  
v. (2)—Title X, Chapter 359, §359-A:21;  
New Jersey, Title 51, §51.1-29—NJAC §§13:47  
D-4.32, 13:47, D-4.33;  
New Mexico, Chapter 54, Art. 1, §54-1-11;  
North Carolina, Div. XVI, Chapter 106, §106-  
130 (5) b—Chapter 81A, Art. 2, §81A-  
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North Dakota, Title 19, Chapter 19-02, §19-  
02.1-10 (5)(b)—N.D. Food and Drug Laws  
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WVAR Chapter 21-2, Ser. 1, 8.1.1.8.2;

Wyoming, Title 35, Chapter 5, Art. 3, §35-  
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IN THE  
**Supreme Court of the United States**

October Term, 1976  
No. 75-1053

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of November, A.D. 1976.

JOSEPH W. JONES, as Director of the County of Riverside, California, Department of Weights and Measures,

*Petitioner,*

vs.

THE RATH PACKING COMPANY, *et al.*,

*Respondents.*

On Writ of Certiorari to the United States Court of Appeals  
for the Ninth Circuit.

**REPLY BRIEF FOR THE PETITIONER**

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JOSEPH W. JONES, as Director of the County of River-  
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*Petitioner,*

*vs.*

THE RATH PACKING COMPANY, *et al.*,

*Respondents.*

On Writ of Certiorari to the United States Court of Appeals  
for the Ninth Circuit.

**REPLY BRIEF FOR THE PETITIONER**

**I**

**Introduction.**

Petitioner submits this Reply to the Brief for Re-  
spondents. Oral argument is scheduled for December  
6, 1976.

The points or questions selected for comment herein  
are items raised in respondents' brief that are deemed  
by petitioner to be of particular relative importance  
and that need further elaboration or clarification. Other  
points discussed by respondents are already sufficiently  
treated in petitioner's opening brief.



## II

### **Under Both State and Federal Laws, the Proper Time for Determining Accuracy of the Weight or Measure of Package Contents Is the Time of Sale to the Consumer, Not the Time of Shipment.**

Simple as it may be, the foregoing is a key question in this lawsuit. Respondents state at page 20 of their brief (hereinafter Rsp. Bf.) that this is the "basic irreconcilable conflict (albeit not the only one)" in the case. However, they identify such "irreconcilable conflict" with the proposition of federal law vs. state law. Respondents contend that federal law requires accuracy at time of shipment, while state law requires accuracy at the time of sale to the purchaser, that is, the consumer or the businessman purchaser. Petitioner agrees that there is an "irreconcilable conflict." But the conflict is between petitioner and respondents, not between federal and state laws.

The weights and measures laws at issue in this case are intended to protect purchasers, both consumers and businesses, not the sellers. *United States v. Wiesenfeld Warehouse Co.*, 376 U.S. 86, 92 (1964); 15 USC 1451; 21 USC 602. Thus, it is fundamental that when such laws mandate that statements of quantity shall be accurate, they are to be accurate at time of purchase.

Both the Federal Food, Drug & Cosmetic Act and the Wholesome Meat Act provide that a food shall be deemed to be misbranded if its labeling is false or misleading in any particular or if any information required by these laws is not stated "*in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of*

*purchase and use,*" (Emphasis added), 21 USC 343(a) and (f); 21 USC 601(n)(6).

The Fair Packaging and Labeling Act specifically declares

"*informed* consumers are essential to the fair and efficient functioning of a free market economy. Packages and their labels should enable *consumers* to obtain *accurate* information as to the quantity of the contents and should facilitate value comparisons," (Emphasis added), 15 USC 1451; *accord*, 9 CFR 317.2(b); 16 CFR 500.7 and 21 CFR 1.8b(a).

Respondents and the Solicitor General follow the position of the Ninth Circuit that federal law does not require accuracy at time of sale, Petition, Appendix 49,<sup>1</sup> 51; Brief of the United States as Amicus Curiae, page 9. This position is predicated upon the erroneous premise that federal law forbids filling (or packaging) products so that they will be true weight at time of sale. Thus, respondents contend overpacking is forbidden by federal law. They cite no authority for their position; indeed there is none.

The most convincing support for the position that federal law permits overpacking so as to give accurate weight at time of sale is the fact that the American packaging industry has been doing it for years with the approval of both state and federal officials. As the Secretary of Commerce states at page 8 of the

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<sup>1</sup>*General Mills et al. v. Jones*, Pet. Appendix 49: "Such practice [overpacking] would, however, violate federal law, which requires accurate weight at the time of packaging, with reasonable variations caused by gain or loss of moisture being recognized only during the course of subsequent distribution. As a result of this conflict, the California scheme cannot stand."

proposed revision of Handbook 67,<sup>2</sup> the *present packaging practice* is that packers overfill. "In general, packers 'target' the average quantity going into the packages far enough above the labeled quantity so that a certain large percentage of packages (70-90% is not uncommon) are equal or overfilled with respect to the labeled quantity." *Id.* at 8.

Are respondents suggesting that the long standing manufacturing practice of American industry is to be scuttled so that consumers will no longer get accurately labeled packages? Is this what Congress intended in enacting the Wholesome Meat Act, the Food, Drug & Cosmetic Act, and the Fair Packaging and Labeling Act?

We submit the following additional authorities in support of the proposition that federal law requires filling so as to give accurate weight to purchasers, and prohibits reliance on net weight "when packed":

(1) The federal regulations that recognize "reasonable variations" do not permit "reasonable shortages;" they prohibit labeling as "net weight when packed;" 9 CFR 317.2(h)(8) as to the Wholesome Meat Act; 16 CFR 500.6 as to the Fair Packaging and Labeling Act; 40 CFR 162.104(e) as to the Federal Insecticide, Fungicide, and Rodenticide Act. Likewise, 21 CFR 1.8b(f) prohibits use of any "term qualifying a unit of weight, measure or count" as to the Food, Drug and Cosmetic Act. The text of these and subsequent regulations are set forth in the Appendix hereto.

<sup>2</sup>The Solicitor General has lodged with this Court a copy of this document, which is entitled "Checking Prepackaged Commodities," National Bureau of Standards, Handbook 67 (Draft, 1975).

(2) 21 CFR 125.3(a), promulgated under the Food, Drug and Cosmetic Act, states that "reasonable variations" for vitamins in enriched flour must be "recognized" because of packaging and distribution considerations, but that this is no excuse for shortages during the shelf life of the product. Overpacking is specifically provided for.

Where overpacking is *not* permitted the regulation specifically says so. Thus, the next subsection, 125.3(b), states that overpacking of iodine content is prohibited.

(3) Another example showing that the packager is responsible for his products which change during distribution is 21 CFR 11.5(c) dealing with microbiological standards for cream pies. Are respondents to tell this Court that since they cannot control the distribution of their products, health officers can not take them off sale because of changes occurring during distribution?

(4) 21 USC 343(g) and (h)(2) provide for standards of identity and standards of fill, respectively. Starting with standard of fill, the regulations provide that for stated container sizes for a particular product the packager must pack a *minimum* net weight, 21 CFR 37.12.

The related standard of identity regulations specify the composition of the particular product. 21 CFR 15.1(a) contains the standard of identity for flour which provides that "Its moisture content is *not more than* 15 percent" (Emphasis added). The amount of moisture varies, among other reasons, depending on "the judgment of the miller" according to General Mills' technical manager, Donald Colpitts. [Single Appendix, page 29.] Thus, the amounts of solids vary



when packaged and also at time of sale from brand to brand and from lot to lot, even assuming the packager does not permit more than 15 percent moisture. [Single Appendix, page 24.] For example, one lot of General Mills flour under its Code No. D225A1 varied from minus 6 ounces to minus 20 ounces. *Id.* 24. Respondents' argument that short weight should be allowed to facilitate value comparisons is thus based on the false premise that all flour contains the same percentage of solids; it quite simply misstates the actual facts.

Other examples underlining the fallacy of respondents' premise are found in the CFR standards of identity for pasteurized processed cheese spread, skim milk cheese for manufacturing and mozzarella cheese.

21 CFR 19.775, relating to pasteurized process cheese spread, provides in subsection (a)(3):

"The moisture content of a pasteurized process cheese spread is more than 44 percent but not more than 60 percent. . . ."

If packagers A, B, and C pack at 44, 60, and 70 percent moisture, respectively, how can a consumer decide among three packages of the product, all of which are short weight by different amounts, or even the same amount, on the basis of actual nutrition? As to flour, the Solicitor General's brief, page 4, says net weight when packed "fosters the Congressional policies of promoting fair competition and assisting consumers to make fair value comparisons among competing products. See 15 USC 1451; 21 USC 602."

How is this accomplished when packers may legally pack between 44 and 60 percent moisture, and for practical purposes may go beyond 60 percent? See also 21 CFR 19.685, skim milk cheese for manufacturing: "not more than 50 percent of moisture"; and CFR 19.600, mozzarella cheese: "more than 52 percent but not more than 60 percent of moisture".

Unlike flour, mozzarella cheese may be eaten without adding moisture. Are respondents to tell us that the shortage doesn't matter because the consumer can have a drink of water? Can cheese packagers label their products "not dried out when packed" and claim the cheese is not misbranded because only moisture has been lost and the nutrition remains?

(5) Handbook 67 (a copy of which has been lodged with the Court by the Solicitor General) states at page 1:

"The primary object of the inspector in this field is to see that quantity is accurately represented to the ultimate purchaser—the consumer;"

The Handbook also provides on the same page:

"Variations in quantities of packages are not permitted to such extent that the averages of the quantities in the packages comprising a lot, shipment, or delivery is below the quantity stated, and an unreasonable shortage in any individual package is not acceptable, even though overages in other packages in the same lot, shipment, or delivery compensate for such shortages. (*This is the basic quantity requirement* of the Model Regulation for



Prepackaged Commodities adopted by the National Conference on Weights and Measures *and of the Federal Food and Drug Administration.*)

(2) Perfection in either mechanical devices or human beings has not yet been attained; thus the existence of imperfection *must be recognized* and allowances for such imperfection must be made. These allowances *are recognized in the 'average' concept.*" (Emphasis added).

As to the *amount* of allowances for "reasonable variations" used in determining whether the lot is at least net quantity on the average, it is stated at page 8 of the Handbook:

"(It will be noted that the suggested plus allowances are twice the suggested minus allowances at each 'labeled quantity.' *This is an acknowledgment that packers must be allowed to overfill such packages as are susceptible of moisture loss.*")" (Emphasis added.)

Ignoring the above, respondents emphasize this language from the Handbook:

"It is admitted that such indefinites as 'ordinary and customary exposure' and 'good distribution practice' are difficult to set forth quantitatively; thus the experience and judgment of the inspector must be relied upon. He will learn to compare various environments and various systems of distribution and storage. As the result of his experience he will be able to develop procedures for conducting a sound investigation."

What this "sound investigation" refers to is the *size of the reasonable variations that should be allowed*

*in computing the lot average.* The quoted language has nothing whatever to do with allowing shortages below the lot average, much less shortages in every package in a lot. See Step 3 page 8, of Handbook 67, which refers to the experience and knowledge of the inspector.

Handbook 67 thus rejects the Ninth Circuit's position that net quantity is to be accurate only "when packed", and the respondents' position that net quantity is to be accurate only "when shipped", and the Handbook recognizes overpacking as a part of good commercial practice to obtain accurate weight at time of sale.

The Ninth Circuit's opinion (Pet. Appx., page 49) and the Solicitor General's brief (page 3) support net weight when packed. Respondents disagree, arguing for net weight "at the time of shipping," *i.e.*, the time when the product enters into interstate commerce (Rsp. Bf. p. 41). How can food packagers of hygroscopic products hope to overfill precisely enough so that packages will be neither overweight nor underweight when the packages are shipped days or weeks later? If accuracy must exist when packages are imported, foreign commerce in hygroscopic food products must end; there is virtually no possibility that packagers of Dutch cheese rounds, for example, can overpack exactly enough so that when the rounds are imported they will have lost just enough weight so they will be neither overweight nor underweight upon inspection at customs.

On the other hand, net weight at time of packaging, *i.e.*, before introduction into interstate commerce, would allow foreign packagers to sell more short weight than American competitors because the foreign packager has a longer distribution period during which the package will continue to lose moisture.

The foregoing authorities show that under federal law good manufacturing practice requires that the product be packed so that the label is accurate at the time and place of sale, for standards of both composition and net quantity.

If respondents hereafter will have no responsibility for label accuracy when the product is sold, on the basis of using a form of "net weight when packed" procedure, can they not claim that the product was "wholesome when manufactured" and that this terminates their responsibility to distributors, retailers and consumers? Is the milk processor to argue that, since bacteria count increases with age, it is not responsible for the quality of the milk in its packages when it is sold to a soup manufacturer, a restaurant or a consumer? Are packagers now to restrain health officers at the time and place of sale from taking their products off the market on the grounds that an administrative hearing is required first and that immediate resort to the courts is not enough? Indeed, if the health officer or the weights and measures inspector cannot look to the wholesomeness of the product and accuracy of the label statement at the time of sale, how can either of them act at all? And if they have to act on a package-by-package basis, (as stated by the Ninth Circuit, *Petition*, Appendix, pp. 48, 49, and 51) instead of by lots as they always have, how effective and adequate can their inspection be?<sup>3</sup> *Peti-*

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<sup>3</sup>Respondents and the Solicitor General disagree (*Rsp. Bf. 50; Sol. Gen. Bf. 7*) with the Ninth Circuit's position (*Petition*, Appendix 48, 49 and 51) on package by package inspection; and in common with Handbook 67 and California's Article 5, affirm lot averaging as a proper inspection procedure.

tioner's brief stressed these practical necessities of inspection. Respondents' answer is silence.

In the *Report to the Congress By the Comptroller General of the United States*, dated April 18, 1972, entitled "Dimensions of Insanitary Conditions in the Food Manufacturing Industry" (Appendix hereto, page 6) it is stated that "FDA describes the food industry in the United States as comprising some 60,000 establishments whose output results in about \$110 billion in purchases by consumers each year. . . . FDA has not had the money or manpower to identify promptly all the food plants operating under insanitary conditions. . . . [Appendix hereto, pages 6, 8] . . . The Congress should also be made aware that FDA *relies almost entirely on state and local governments* for inspectional coverage of some 500,000 restaurants and retail food stores that receive or ship products interstate. Inspection of these establishments by FDA to the extent necessary to judge whether such reliance is justified, would require the use of inspection resources" (Emphasis added). (Appendix hereto, p. 13.) These conclusions are confirmed by Peter Barton Hutt, Assistant General Counsel for the Food and Drug Administration in an article in the *Food, Drug and Cosmetic Law Journal*, March 1973, Appendix hereto. Since the Food and Drug Administration cannot even cope with adulterated food products, even with the strong support of this Court in such cases as *United States v. Dotterweich*, 320 U.S. 277 (1948) and *United States v. Park*, 421 U.S. 658 (1975), what priority can we expect the Food and Drug Administration to give to short weight? What hope would the federal agencies have of policing short weight and unfair competition under the Ninth



Circuit decision? By contrast the contemporaneous Second Circuit decision in *General Mills v. Furness*, 398 F.Supp. 151 (S.D.N.Y. 1974, aff'd, 508 F.2d 536), recognizes the compelling need for vigorous enforcement by the states under the present system.

### III

#### **California Laws and Regulations Are Neither Preempted by, nor in Conflict With, Applicable Federal Laws.**

Petitioner has developed in his opening brief the proposition that the "concurrent jurisdiction" given to the states and the Secretary of Agriculture under 21 USC 678, affirms to the states their police power to order off sale packages of food products misbranded as to weight or measure of package contents. Respondents state (Rsp. Bf. 13) that such concurrent jurisdiction is limited in the sense that petitioner must follow federal, rather than state, standards of definition.

If this Court should hold, as petitioner has urged above, that the labeled net weight must be accurate at the time of sale, then there is no conflict in standards.

As this court has repeatedly held, it is only when there exists an irreconcilable conflict between state and federal laws, that the former must yield, *e.g.* *Kelly v. Washington*, 302 U.S. 1, 10 (1937).

The analysis with respect to the Wholesome Meat Act is not materially different than that under the Food, Drug & Cosmetic Act and Fair Packaging & Labeling Act. Thus even assuming *arguendo* that 21 USC 678 preempts conflicting state laws, if federal

law requires true weight (on the average)<sup>4</sup> at retail, then there is no conflict in *standards* between state and federal law. The question becomes, does the state *procedure* stand as an obstacle to achievement of the Congressional purpose? *Hines v. Davidowitz*, 312 U.S. 52 (1941).

Petitioner contends that California's standard is in full accord with the federal purpose—true weight to businessmen and consumers as purchasers.

Respondents contend that the California weight testing procedure impermissibly conflicts with the federal procedure for the reasons that (1) the State does not specifically "recognize" reasonable variations resulting from (a) good manufacturing practice, or (b) good distribution practice; (2) California uses an actual or wet tare procedure while the federal officials use a dry tare procedure; and (3) California does not order off sale overweight packages.

First, the California regulation is specifically designed to "recognize" variations, whether caused by manufacturing or distribution reasons. It does so in the same manner as Handbook 67. These variations are "recognized in the 'average concept.' Handbook 67, *supra*, pages 7, 8; Calif. Bus. & Prof. Code, 12211; Health & Safety Code, 26551; 4 Cal. Admin. Code 2930 (Art. 5).

The Ninth Circuit's opinion also acknowledges that California's Article 5 recognizes reasonable variations

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<sup>4</sup>It is in this sense that the reasonable variations regulations must be interpreted. The term variation means fluctuations about a point or standard, viz., label weight, and not, as respondents contend, shortage in every package. See quotation from Handbook 67, *supra*, pages 7 and 8, stating that this is the proper interpretation of reasonable variations.



in the average concept. Pet. App. p. 48. Although the circuit court's opinion faults California for using a lot average, both respondents and the Solicitor General concur that lot averaging is proper (Rsp. Bf. p. 50 fn., Brief of the United States p. 7, fn. 4).

Second, respondents err in their contention that federal law does not require use of actual or wet tare at retail. The Food, Drug & Cosmetic Act, the Wholesale Meat Act, and the Fair Packaging & Labeling Act require that packages bear the weight of contents "exclusive of wrappers and packing substances," 9 CFR 317.2(h)(2) and 21 CFR 1.8b(q); 16 CFR 500.22, and require that statements of weight not be false or misleading and be in "such terms as will be read and understood under customary conditions of purchase and use," 15 USC 1453(b), 21 USC 343(a) and (f), 21 USC 601(n)(6), 9 CFR 301.2(ii)(5)(ii); 301.2(ii)6; 317.2(b); 317.8(a) and 329.1. No one expects when he buys a package of, *e.g.*, respondent Rath's bacon labeled "NET WEIGHT 16 Oz.", that he is getting less than 16 oz. or that the 16 oz. includes that the wet paper (sponge) inside the package. Respondents' interpretation of the law is contrary to its terms and to its intent.

Third, to require Jones to remove from sale overweight packages is hardly a prudent or sensible enforcement procedure. Such a procedure would not help consumers and is expensive for packers; further, such a requirement is directly contrary to the instructions of the National Bureau of Standards, the agency charged by Congress with developing appropriate weights and measures enforcement procedures.

### Conclusion.

American industry has adopted the Secretary of Commerce's interpretation of reasonable variations in the day-to-day operations of packaging well over 10,000 different products. What respondents ask is not merely a different interpretation of, but a drastic change in, American trade practices, which would adversely affect our farmers, businessmen and consumers.

Respectfully submitted,

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## **APPENDIX.**

### **21 USC 343:**

A food shall be deemed to be misbranded—

(g) If it purports to be or is represented as a food for which a definition and standard of identity has been prescribed by regulations as provided by section 341 of this title, unless (1) it conforms to such definition and standard, and (2) its label bears the name of the food specified in the definition and standard, and, insofar as may be required by such regulations, the common names of optional ingredients (other than spices, flavoring, and coloring) present in such food.

(h) If it purports to be or is represented as—

(1) a food for which a standard of quality has been prescribed by regulations as provided by section 341 of this title, and its quality falls below such standard, unless its label bears, in such manner and form as such regulations specify, a statement that it falls below such standard; or

(2) a food for which a standard or standards of fill of container have been prescribed by regulations as provided by section 341 of this title, and it falls below the standard of fill of container applicable thereto, unless its label bears, in such manner and form as such regulations specify, a statement that it falls below such standard.

### **9 CFR 317.2(h)(8):**

The statement shall appear as a distinct item on the principal display panel and shall be separated by

a space at least equal to the height of the lettering used in the statement from other printed label information appearing above or below the statement and by a space at least equal to twice the width of the letter "N" of the style of type used in the quantity of contents statement from other printed label information appearing to the left or right of the statement. It shall not include any term qualifying a unit of weight, measure, or count such as, "jumbo quart," "full gallon," "giant quart," "when packed," "Minimum" or words of similar import.

**16 CFR 500.6(b):**

The declaration of net quantity shall appear as a distinct item on the principal display panel, shall be separated (by at least a space equal to the height of the lettering used in the declaration) from other printed label information appearing above or below the declaration and, shall not include any term qualifying a unit of weight, measure, or count such as "jumbo quart," "full gallon," "when packed," "minimum," or words of similar import. . . .

**21 CFR 1.86(f):**

The declaration shall appear as a distinct item on the principal display panel, shall be separated (by at least a space equal to the height of the lettering used in the declaration) from other printed label information appearing above or below the declaration and (by at least a space equal to twice the width of the letter "N" of the style of type used in the quantity of contents statement) from other printed label information appearing to the left or right of the declaration. It shall not include any term qualifying a unit of weight, measure, or count (such as "jumbo quart" and "full gallon")

that tends to exaggerate the amount of the food in the container. . . .

**21 CFR 11.5:**

(a) For the purposes of this section a frozen ready-to-eat banana, coconut, chocolate, or lemon cream-type pie is a frozen ready-to-eat pie that is labeled as and/or has the physical and compositional characteristics of a cream-type pie, including but not limited to semi-solid filling and/or topping, and contains flavoring and/or fruit ingredients corresponding to the banana, coconut, chocolate, or lemon flavor representation made for such pie. It is made with or without a crust.

(b) A sample of a frozen ready-to-eat banana, coconut, chocolate, or lemon cream-type pie, as defined §11.2(b) when examined by the methods described in sections 41.015 and 41.016 of the "Official Methods of Analysis of the Association of Official Analytical Chemists" 11th Ed. (1970), shall meet standards of microbiological quality as follows:

(1) Aerobic plate count (geometric mean)  $\leq 50,000$  per gram.

(2) Coliform count (geometric mean)  $\leq 50$  per gram, MPN.

(c) If the microbiological quality of the cream-type pies described in paragraph (a) of this section falls below the standard prescribed by paragraph (b) of this section, the label shall bear the statement of substandard quality specified in § 11.1(b)(1)(i).

**21 CFR 15.1(a):**

Flour, white flour, wheat flour, plain flour, is the food prepared by grinding and bolting cleaned wheat, other than durum wheat and red durum wheat. . . .

Its moisture content is not more than 15 percent. . . .



**21 CFR 37.12:**

(a) The standard of fill of container for canned salmon, based on a 24-can average, is a fill including all the contents of the container and is not less than the minimum net weight specified for the corresponding can size in the following table:

I. Can size	II. Minimum net weight
603x405 .....	64 oz. (4 lb.)
301x411 .....	16 oz. (1 lb.)
301x408 .....	15½ oz.
401x211 .....	15½ oz.
607x406x108 .....	15½ oz.
301x308 .....	12 oz.
307x200.25 .....	7¾ oz.
513x307x103 .....	7¾ oz.
307x113 .....	6¾ oz.
301x106 .....	3¾ oz.
407x213x015 .....	3¾ oz.

If the can size in question is not listed, calculate the value for column II as follows: From the list, select as the comparable can size, that one having the nearest water capacity of the can size in question, multiply the net weight listed in column II by the water capacity of the can size in question, and divide by the water capacity of the comparable can size. Water capacities are determined by the general method provided in § 10.6(a) of this chapter.

(b) If canned salmon falls below the standard of fill or container prescribed in paragraph (a) of this section, the label shall bear the general statement of substandard fill specified in § 10.7(b) of this chapter, in the manner and form therein specified.

**21 CFR 125.3:**

(a) If a food purports or is represented to be for special dietary use because of vitamin or mineral properties, the label shall bear a statement of the percentage of the U.S. RDA of such vitamins and minerals, as set forth in § 125.1(b), supplied by such food when consumed in a specified quantity during a period of 1 day. The quantity specified shall be a reasonable quantity suitable for and practicable of consumption within 1 day. The order in which the nutrients appear on the label shall be in the order listed in § 125.1(b), except when other regulations indicate otherwise. Immediately preceding the declaration of vitamin and mineral content, the following heading shall be stated, "Percentage of U.S. Recommended Daily Allowances (U.S. RDA)". If such purported or represented special dietary use is for persons within one or more groups for which the recommended daily allowance is set, such statement shall include the percentage for each age groups. When such proportion or percentage is a whole number and a fraction or a whole number and a decimal, it shall be expressed as the whole number disregarding the fraction or decimal. The total quantity of vitamins or minerals in a food shall be no less than the amount declared, and no more than a reasonable amount above the declared quantity. Reasonable variations caused by heat, light, oxidation, storage, transportation, or unavoidable deviations in good manufacturing practice are recognized.

(b) The requirements of this section shall not apply to iodized salt, when the declared content of the iodine compound in the salt is equivalent to 0.01 percent by weight iodine.

**40 CFR 162.104(e):**

*Allowance for loss.* A statement of net content "when packed" does not comply with the requirements of the act. The statement must be such that it will be correct as long as the economic poison is subject to the law. Thus, if a product such as borax may lose weight by drying out when stored in paper bags, it must be packed and labeled in such a way that the statement of net content will be correct when the product is purchased.

**Report to the Congress. Dimensions of Insanitary Conditions in the Food Manufacturing Industry. Food and Drug Administration, Department of Health, Education, and Welfare, by the Comptroller General of the United States. [April 18, 1972, pages 1 to 5.]**

[Letterhead]

**DIGEST**

**WHY THE REVIEW WAS MADE**

The Food and Drug Administration (FDA) is required, by law, to provide assurance that food products shipped across State borders—which includes most of the foods purchased by the American people—are processed under sanitary conditions and are safe, pure, and wholesome to eat.

The General Accounting Office (GAO) wanted to know whether FDA was able to provide this assurance. FDA describes the food industry in the United States as comprising some 60,000 establishments whose output results in about \$110 billion in purchases by consumers each year.

FDA's inventory of establishments subject to inspection includes about 32,000 food manufacturing and process-

ing plants. FDA inspects such plants to determine whether their products meet requirements of the Food, Drug and Cosmetic Act (FD&C Act). FDA's inventory includes also about 28,000 establishments of other types, such as storage facilities and repacking and relabeling plants. It excludes restaurants, retail stores, and meat and poultry slaughtering and processing plants.

To assess sanitary conditions in the food manufacturing industry, GAO requested FDA to inspect 97 food manufacturing and processing plants selected at random from about 4,550 food manufacturing and processing plants in six FDA districts including 21 States. (See pp. 19 and 20.)

GAO auditors accompanied FDA inspectors on their inspections of 95 of the plants.

The 97 plants had annual sales of about \$443 million. They manufactured or processed bakery products, candy, fish, flour, carbonated beverages, cheese, ice cream, fruits, vegetables, popcorn, chips, sugar, jams and jellies, macaroni, pizzas, spices, etc.

This report has two basic purposes: (1) to show the dimensions of insanitary conditions in the food manufacturing industry and (2) to suggest ways to improve the FDA's management of the program which is intended to ensure compliance by the industry with standards of sanitation required by the FD&C Act. Conditions believed to exist in the industry have been projected through the use of statistical sampling techniques. Therefore it would not be equitable to single out by name the 97 plants visited from the 4,550 plants which formed the basis for the statistical projection. Accordingly the plants have not been identified in the report.



## FINDINGS AND CONCLUSIONS

### *Overall findings*

During the past 3 years, FDA inspections have indicated that sanitary conditions in the food industry in the United States are deteriorating. FDA did not know how extensive these insanitary conditions were and therefore could not provide the assurance of consumer protection required by the law.

A serious problem of insanitary conditions exists in the food manufacturing industry. Several actions must be taken by FDA to alleviate these conditions.

### *Existing conditions*

Of the 97 plants included in the sample, 39, or about 40 percent, were operating under insanitary conditions.

Of these, 23, or about 24 percent, were operating under serious insanitary conditions having potential for causing, or having already caused, product contamination.

Photographs of conditions at some plants, taken during FDA-GAO inspections, and detailed descriptions of some of the inspection results, will be found in chapter 2.

On the basis of the sample, GAO estimated that 1,800, or about 40 percent, of the 4,550 plants were operating under insanitary conditions, including 1,000, or about 24 percent, operating under serious insanitary conditions.

FDA officials advised GAO that conditions at plants located in the 21 States would, in their opinion, be representative of conditions at plants nationwide.

### *Inspection manpower*

FDA has not had the money or manpower to identify promptly all the food plants operating under insanitary conditions. During the last 3 years, FDA has sharply reduced its sanitation inspection coverage of food plants in an attempt to cope with more critical problems, such as microbiological contamination and drug hazards.

FDA has a management improvement program under way to develop a system for improving the effectiveness of its field operations. (See p. 31.)

Although it has a responsibility under the FD&C Act, FDA generally does not inspect restaurants and other retail food stores but relies instead on State and local officials for this regulation. (See p. 25.)

According to officials of the Department of Health, Education, and Welfare (HEW), the President, HEW, and FDA have recognized the need to increase and improve the inspection capability of FDA to make an effective impact upon present insanitary conditions of the food manufacturing industry.

### *Enforcement*

In several instances of insanitary conditions found during plant inspections, GAO noted a need for more timely and aggressive enforcement action by FDA. In 14 of 111 enforcement actions reviewed, or 13 percent, the action to correct the problem was inadequate for a variety of reasons. (See p. 35.)

Although judgment is involved in selecting the appropriate actions in each case, criteria or guidelines are needed to assist the FDA districts in making these decisions, particularly for repeated violators.



### *Causes of conditions*

Although responsibility for sanitation rests with the food manufacturers, GAO believes that factors contributing to the poor sanitation conditions in the industry are (1) FDA's limitation in resources to make inspections and (2) lack of timely and aggressive enforcement actions by FDA when poor sanitation conditions are found.

During fiscal year 1972 FDA plans to inspect about 9,400 food establishments and has 210 inspectors to do the job. The planned number of inspections clearly is inadequate to detect all insanitary establishments.

FDA's inventory of food manufacturers for planning inspections and measuring the scope of its plant inspection responsibility was not complete or accurate. For six FDA districts, 22 percent of the plants listed were out of business, 8 percent were misclassified as food manufacturers, and 6 percent were not an FDA inspection responsibility.

FDA officials told GAO that there are food plants in existence which may not be on its inventory because, in the absence of plant registration requirements, FDA does not have an effective means of identifying all food plants subject to the FD&C Act. (See p. 19.)

More effective use of consumer complaints, an accurate inventory of food plants subject to inspection, and data indicating the effectiveness of inspections and regulatory actions could contribute to improving sanitary conditions of the food manufacturing industry.

FDA should (1) notify violators officially of sanitation standards violated, (2) request a prompt reply, and (3) monitor cases to promote corrective action. Without

these actions, plants may continue to disregard sanitation standards, making reinspections necessary to determine whether corrective actions have been taken. (See p. 40.)

Providing in the law for civil penalties (fines) for violations of the FD&C Act would allow FDA more flexibility in enforcing sanitation standards. (See p. 40.)

### *Consumer complaints*

FDA is devising a computerized system to record consumer complaints to identify industry and product problem areas. The output of the system, in GAO's opinion, should be used also to monitor the disposition of such complaints.

Insanitary products that had reached the consumers might have gone undetected by FDA for some time had not the consumer complained.

### *RECOMMENDATIONS OR SUGGESTIONS*

GAO recommends that the Secretary, HEW, direct FDA, to:

- Periodically select and inspect a representative number of food plants to assess industrywide conditions and report its assessments to the Congress.
- Periodically evaluate the accuracy of the inventory of food plants to be inspected so that FDA will know the scope of its responsibilities and resources needed for sanitation inspections. FDA should provide this data to the Congress for the same reason.
- Establish milestones for implementing its management improvement program for using statistical techniques to identify problem areas, allocate resources, and measure the effectiveness of its regulatory actions.

- Monitor the implementation of the improvement program and advise appropriate congressional committees periodically on the progress being made in, as well as the various levels of resources needed for, implementing the program; and develop an interim plan of action, pending the completion of this program, for consideration by the Congress.
- Establish criteria for the districts to use in determining (1) when more aggressive action should be taken against plants that violate good manufacturing practice regulations and (2) what type of action should be taken.
- Take a stronger enforcement posture against those plants that show continuing flagrant disregard of the FD&C Act.
- Issue written notices in all cases of plants not complying with the FD&C Act and request written responses on actions taken or planned to correct the violations and to ensure continued compliance.
- Obtain feedback on the disposition of all cases referred to State or other regulatory bodies for corrective action.
- Implement a uniform system for recording consumer complaints to monitor the disposition of complaints at the local level and to provide headquarters' officials with a means of identifying industry and product problems affecting more than one district.

#### *AGENCY ACTIONS AND UNRESOLVED ISSUES*

GAO submitted a draft of this report to the Secretary, HEW, for comment. The views of FDA and HEW were discussed with GAO and included in the report. HEW concurred in GAO's recommendations and advised that a number of corrective actions had been

or would be taken. (See pp. 17, 22, 32, 40, and 44.)

#### *MATTERS FOR CONSIDERATIONS BY THE CONGRESS*

In the light of the insanitary conditions shown to exist in the food manufacturing industry, the Congress should, upon receipt of a more accurate inventory of food plants under FDA's jurisdiction and an interim plan of action, consider the adequacy of FDA's inspectional coverage of food plants with the resources available under its current appropriation.

The Congress should also be aware that FDA relies almost entirely on State and local governments for inspectional coverage of some 500,000 restaurants and retail food stores that receive or ship products interstate. Inspections of these establishments by FDA to the extent necessary to judge whether such reliance is justified, would require the use of inspection resources.

To attain additional flexibility for enforcing the FD&C Act, the Congress should consider amending the law to provide for civil penalties when food sanitation standards are violated.

**Food, Drug and Cosmetic Law Journal**  
**March, 1973—pp.178, 180-181.**

**PHILOSOPHY OF REGULATION  
UNDER THE FEDERAL FOOD,  
DRUG AND COSMETIC ACT**

**By PETER BARON HUTT**

Mr. Hutt Is Assistant General Counsel for Food and Drugs, Department of Health, Education, and Welfare. His Paper Was Presented at the Food and Drug Law Institute—Food and Drug Administration Sixteenth Annual Educational Conference in Washington, D. C. on December 12, 1972.

. . . [A]s long as any official is charged with the enforcement of this statute, he must and will continue to exercise enormous discretion in its administration.

**Impossible to Regulate All Industries**

Just one example will suffice to illustrate this point. It is outside the realm of possibility, either now or in the foreseeable future, for the Food and Drug Administration fully to enforce every provision of the Act. One simply cannot achieve optimal regulation of a highly inventive \$135 billion a year group of industries on a budget of \$164 million. Indeed, the entire budget of the Food and Drug Administration could undoubtedly be devoted to the enforcement of any of a number of individual subsections of the Act without achieving full enforcement of even that limited provisions. As a matter of practical necessity, therefore, we must set priorities and develop programs designed to achieve the greatest impact possible from the limited resources available. This unquestionably means that worthwhile projects and programs, and even entire sections of the law, will receive inadequate attention.

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No. 75-1053

Supreme Court, U. S.  
FILED

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MICHAEL RODAK, JR., CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1976

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JOSEPH W. JONES, PETITIONER

v.

THE RATH PACKING COMPANY, ET AL.

---

ON WRITS OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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*ON WRITS OF CERTIORARI TO THE UNITED STATES  
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**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

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This brief is submitted in response to this Court's order of April 19, 1976, inviting the Solicitor General to express the views of the United States.

**QUESTION PRESENTED**

The United States will discuss the question whether federal laws and regulations pertaining to net-weight labeling of pre-packaged meat and flour preempt California's net-weight labeling requirements for those foods.

## INTRODUCTION AND SUMMARY OF ARGUMENT

1. Respondent Rath Packing Company is a meat processor subject to federal regulation under the Wholesome Meat Act of 1967, 81 Stat. 584, as amended, 21 U.S.C. 601 *et seq.* Among Rath's meat food products (see 21 U.S.C. 601(j)) is bacon, which the company packages in containers for ultimate retail sale (A. 69).

Respondents General Mills, Inc., the Pillsbury Company, and Seaboard Allied Milling Corporation manufacture, package, and sell wheat flour. Wheat flour is a "food" under the Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040, as amended, 21 U.S.C. 301 *et seq.*, and a "consumer commodity" under the Fair Packaging and Labeling Act, 80 Stat. 1296, as amended, 15 U.S.C. 1451 *et seq.*

Respondents' bacon and wheat flour contain moisture when packaged. Unless bacon is packaged in a non-absorbent and airtight container, it loses moisture during distribution, both by absorption and evaporation (A. 61). Flour is hygroscopic and, unless packaged in an airtight container, may lose or gain moisture during distribution depending upon the ambient relative humidity (A. 32).

Since respondents do not use airtight containers for their bacon and flour, and since Rath uses absorbent packing materials for its bacon,<sup>1</sup> the net weight of

<sup>1</sup> There may be nutritional and ecological advantages to using absorbent rather than non-absorbent packing materials. See Brickenkamp, Hasko, and Natrella, *Checking Prepackaged*

the bacon and flour after packaging varies in accordance with the gain or loss of moisture during distribution.

2. The applicable federal legislation prohibits the distribution by respondents of packaged bacon or flour unless the package bears a label containing an accurate statement of the net weight of the contents. 15 U.S.C. 1453(a)(2); 21 U.S.C. 331(a), 343(e); 21 U.S.C. 601(n)(5), 610(b). Because the net weight of respondents' packaged bacon and flour varies in accordance with the gains or losses of moisture during distribution, respondents cannot ensure that the label's statement of net weight will correspond exactly to the actual net weight of the contents at all stages of the packing, shipping, and distribution process. A standard of "accuracy" in these circumstances can require a correspondence between actual and labeled net weight at only one time and place. If the correspondence exists at the prescribed time and place, then the label's statement of net weight is accurate regardless of reasonable variations attributable to subsequent gains or losses of moisture.

The federal regulatory scheme under the Meat, Food, and Labeling Acts requires correspondence between actual and labeled net weight at the time and place of packaging, and it permits such "[r]easonable variations" from the labeled net weight as are thereafter "caused by loss or gain of moisture during

the course of good distribution practices \* \* \*." 9 C.F.R. 317.2(h)(2); 21 C.F.R. 1.8b(q).<sup>2</sup>

The regulations (set forth at Pet. App. 92-93) were promulgated by the Secretary of Agriculture and the Secretary of Health, Education, and Welfare pursuant to their authority under the Meat Act and the Food Act, respectively, to implement the statutory requirement of accuracy through regulations permitting "reasonable variations" from labeled net weight. 21 U.S.C. 601(n)(5); 21 U.S.C. 343(e). The HEW regulation, 21 C.F.R. 1.8b(q), was also promulgated under the Labeling Act, which, though it does not

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<sup>2</sup> This scheme fosters the Congressional policies of promoting fair competition and assisting consumers to make fair value comparisons among competing products. See 15 U.S.C. 1451; 21 U.S.C. 602. If the regulatory scheme required that labeled weight correspond to actual weight at the time and place of retail sale regardless of any weight variations attributable to gain or loss of moisture, then two identically priced one-pound packages of flour, each having an actual net weight of one pound at the time of sale, might actually contain quite different quantities of flour. For example, one package might contain 15 percent moisture, the other only 10 percent moisture. The consumer who purchased the package containing more moisture, thinking that it was equal in value to the other package, would in fact receive a smaller quantity of flour.

The federal scheme, by contrast, requires that labeled weight correspond to actual weight at the time of packaging, when, because of the milling process, the moisture content of flour is uniformly 13 to 14 percent (A. 28-29). The result is that two one-pound packages of flour, accurately labeled at the time of packaging, will contain equivalent amounts of flour throughout the distribution process. Any actual weight differences between the two packages at the time of sale would be attributable to gains or losses of nutritionally valueless moisture during distribution.

explicitly provide for "reasonable variations" from labeled net weight, specifically authorizes the Secretary to promulgate regulations to excuse "full compliance" with otherwise applicable requirements if such compliance "is impracticable or is not necessary for the adequate protection of consumers \* \* \*." 15 U.S.C. 1454(b).

The regulations also permit such reasonable variations from labeled net weight as are caused prior to shipment by "unavoidable deviations in good manufacturing practice \* \* \*." 9 C.F.R. 317.2(h)(2); 21 C.F.R. 1.8b(q). Unlike variations caused by loss or gain of moisture during distribution—which can reduce or increase the total weight of an entire lot of packaged meat or flour—the deviations inherent in any manufacturing process result in slight differences in the actual weight of identically labeled packages within a lot but should not affect the total weight of an entire lot. In good manufacturing practice, the overfills and underfills are not unreasonably large and are clustered around a "target" or average weight that satisfies the standard of accuracy for the lot as a whole. See A. 86-89; Brickenkamp, Hasko, and Natrella, *Checking Prepackaged Commodities—Revision of National Bureau of Standards Handbook 67, supra*, at p. 8.

The California regulatory scheme invoked by petitioner and applied to respondents' products differs from the federal scheme both in the nature of its net-weight labeling standard and in the time and place at which the standard is applied. Whereas federal



law requires that the labeled weight correspond to the actual weight of the package's contents at the time and place of packaging and allows reasonable variations above or below the stated weight if those variations are caused by gain or loss of moisture during the course of subsequent good distribution practice, the California law applied by petitioner requires that "the average weight \* \* \* of the packages or containers in a lot \* \* \* shall not be less, at the time of sale or offer for sale, than the net weight \* \* \* stated upon the package \* \* \*." Cal. Bus. & Prof. Code § 12211 (1964).

The state scheme allows any variation in the lot average above the stated weight and forbids any variation in the lot average below the stated weight, without regard to the cause of those variations or their reasonableness in either direction.<sup>3</sup> California's sampling procedure for checking the lot average weight of packaged commodities leaves some room for statistical sampling errors. See Cal. Admin. Code, Title 4, Chapter 8, Subchapter 2, Article 5, § 2933.3.12 (a) and (b) (reproduced at Pet. App. 83-86). But

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<sup>3</sup> Because the state standard relates to the lot average, weight variations among individual packages that might be caused by deviations in good manufacturing practice are implicitly permitted. But any individual package whose net weight is unreasonably less than the labeled weight is held to be in violation of the state standard and is subject to appropriate enforcement action. Cal. Admin. Code, Title 4, Chapter 8, Subchapter 2, Article 5, § 2933.3.12(c) (reproduced at Pet. App. 86-87).

the procedure makes no allowance for weight variations caused by gain or loss of moisture (A. 108).

3. It is the disparate regulatory treatment of weight variations caused by gain or loss of moisture that is primarily responsible for the conflict between the federal and state regulatory systems—a conflict that makes it impossible for meat processors and flour producers in respondents' situation to assure compliance with both the federal and the state net-weight labeling requirements.<sup>4</sup> Under settled preemption principles, the state scheme must yield to the federal to the extent of the conflict.

Even apart from the unavoidable clash of the two schemes, the state requirements are expressly preempted by the terms of the Meat Act and the Labeling Act. The Meat Act forbids the imposition by a state of any "[m]arking, labeling, [or] packaging \* \* \* requirements in addition to, or different than, those

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<sup>4</sup> Petitioner asserts that it is California's lot average sampling procedure that "may be the key to the lower Court's invalidation of the California statute and regulations" (Br. 16). Contrary to petitioner's view, however, nothing in the court of appeals' opinion forecloses the use of a statistically valid lot average sampling procedure. Federal net-weight inspections under the Meat Act, the Food Act, and the Labeling Act are themselves conducted pursuant to such a procedure. See United States Department of Agriculture, *Meat and Poultry Inspection Manual*, § 18.61(b) (2), pp. 168-174 (1973); Food and Drug Administration, *Inspection Operations Manual*, § 448 (1976). The court of appeals held only that the State may not, in applying its sampling procedure, disregard reasonable weight variations caused by gain or loss of moisture during the course of good distribution practice.

made under [the Meat Act].” 21 U.S.C. 678. The net-weight labeling standard established under the Act—correspondence between actual and labeled weight at the time of packaging, with reasonable variations allowed for loss or gain of moisture during distribution—is a “labeling requirement.” Since California’s standard—requiring that actual weight be “not less than” labeled weight at the time of sale, with no allowance for moisture variations—significantly differs from the federal requirement, it is barred by the Meat Act.

Similarly, the Labeling Act expressly supersedes state net-weight labeling laws that “are less stringent than or require information different from” the applicable federal standard. 15 U.S.C. 1461. California’s regulation is “less stringent than” the federal because it allows the sale of overweight lots of packaged flour regardless of the reasonableness or cause of the variance from labeled weight. It “require[s] information different from” the federal because it provides that the label must show the minimum actual weight of a package of flour at the time of sale regardless of moisture loss, while under the federal standard the label must show the correct weight at the time of packaging, which may exceed, because of moisture loss, the actual weight at the time of sale.

## ARGUMENT

### The Federal Laws And Regulations Pertaining To Net-Weight Labeling Of Packaged Meat And Flour Preempt California’s Net-Weight Labeling Requirements For Those Foods

1. California’s regulatory scheme for the net-weight labeling of meat and flour conflicts irreconcilably with the federal scheme and “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Hines v. Davidowitz*, 312 U.S. 52, 67. To satisfy California’s requirement that the actual net weight of respondents’ bacon and flour at the time of sale equal or exceed the labeled net weight, respondents would be forced to overpack their containers to the extent of the maximum foreseeable moisture loss during distribution. To do so, however, would violate federal standards requiring an accurate statement of the net weight of the contents at the time of packaging. For example, in order to satisfy California, a producer might have to pack one pound and two ounces in a package labeled “one pound,” and that label would violate federal law.

Conversely, to satisfy federal accuracy standards, respondents would have to risk violating California law. A container that is accurately labeled as to net weight under federal standards at the time of packaging will predictably fail to comply with California’s net weight standard at the time of sale if, as in the case of bacon and sometimes in the case of flour, the contents lose moisture during distribution.



It follows under the Supremacy Clause that petitioner may not properly enforce the net-weight labeling standard that he has invoked with respect to respondents' products. "[T]o the extent that the state law interferes with or frustrates the operation of the acts of Congress, its provisions must yield to the superior Federal power given to Congress by the Constitution." *McDermott v. Wisconsin*, 228 U.S. 115, 132. Since the California law under which petitioner acted conflicts with the federal regulatory scheme under all three Acts, the court of appeals correctly held that the state law may not be enforced with respect to either of the products involved in this case.<sup>5</sup>

2. Even if there were no irreconcilable conflict between the different federal and state standards, the Supremacy Clause would nevertheless require subordination of the applicable state law, because Congress, in both the Meat Act and the Labeling Act, ex-

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<sup>5</sup> Respondents argue (Br. 45-50) that California statutes and regulations, other than those under which petitioner acted, expressly adopt the statutory and regulatory standards for net-weight labeling established under the Meat Act, Food Act, and Labeling Act. We take no position here on the proper interpretation of California law. But if, as respondents suggest, the laws upon which petitioner based his enforcement actions have in fact been superseded by other state laws that explicitly incorporate the applicable federal standards, then the preemption issue in this case may actually involve a conflict, not between federal law and state law, but rather between federal law and one state official's misinterpretation of state law. In either event, for the reasons stated above, the conflict exists and must be resolved in favor of federal law under the Supremacy Clause.

pressly preempted all state laws establishing net-weight labeling requirements different from those established under the federal statutes.

(a) The Meat Act provides that "[m]arking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State." 21 U.S.C. 678. There is no question that that statute expresses "the clear and manifest purpose of Congress" (*Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230) to supersede state "marking, labeling, [and] packaging \* \* \* requirements" that differ from those established for meat food products under the Meat Act. The only question is whether the net-weight labeling standard established under the Meat Act is a "marking, labeling, [or] packaging" requirement and whether, if it is, the California requirement is "in addition to, or different" from, the federal requirement.

The Act proscribes the sale or transportation of misbranded articles of meat food products. 21 U.S.C. 610(b). An article is "misbranded" if, *inter alia*, "its labeling is false or misleading in any particular" (21 U.S.C. 601(n)(1)) or the labeling of its package or container fails to show "an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count." 21 U.S.C. 601(n)(5)(B). These requirements that labels not be false and misleading and that they state quantity accurately are quintessential "labeling requirements."

In connection with the requirement that labels set forth an accurate statement of quantity, Congress pro-



vided that "reasonable variations may be permitted \* \* \* by regulations prescribed by the Secretary [of Agriculture]." 21 U.S.C. 601(n)(5). The Secretary's regulation allowing "[r]easonable variations caused by loss or gain of moisture during the course of good distribution practices" (9 C.F.R. 317.2(h)(2)) amplifies the net-weight standard of 21 U.S.C. 601(n)(5)(B) and is part of the "labeling requirement" established by that provision.\*

It follows that California's net-weight labeling requirement is expressly preempted by the Meat Act unless it is neither "in addition to" nor "different" from the federal requirement. 21 U.S.C. 678. We have already shown that the California requirement is significantly different from the federal: it establishes a net-weight standard of "not less than" the stated weight at the time of sale, in place of the fed-

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\* In opposition to this, petitioner argues that "[l]abeling is a matter of format, not of substance behind the label" (Br. 40), and therefore that, by definition, a requirement pertaining to the label's substantive accuracy is not a "labeling requirement" within the meaning of the Act. That argument, which might have force in a context where the only express statutory requirements pertaining to labeling related to format, would here require an unacceptably "strained and unnatural reading." *Chandler v. Roudebush*, No. 74-1599, decided June 1, 1976, slip op. 8. The Meat Act imposes requirements with respect to the substantive accuracy, as well as the format, of labels, and Congress must be understood to have used the phrase "labeling requirements" as referring to all requirements imposed with respect to labeling under the Act. That "plain, obvious and rational meaning" (*ibid.*) of the phrase must be preferred to petitioner's "curious, narrow, hidden" (*ibid.*) interpretation.

eral accuracy standard that permits reasonable variations below stated weight caused by loss of moisture prior to the time of sale. Federal law consequently preempts the state requirements with respect to the net-weight labeling of bacon, "because 'Congress has unmistakably so ordained' that result." *DeCanas v. Bica*, No. 74-882, decided February 25, 1976, slip op. 5, quoting from *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142.

Petitioner argues (Br. 36-40), however, that the Meat Act specifically authorizes his enforcement of California's different labeling requirements. He relies upon the portion of 21 U.S.C. 678 that allows a state, "consistent with the requirements under this chapter, [to] exercise concurrent jurisdiction with the Secretary over articles required to be inspected under [the Act], for the purpose of preventing the distribution for human food purposes of any such articles which are adulterated or misbranded \* \* \*." That provision authorizes the state to undertake, concurrently with the federal government, efforts to enforce the *federal* labeling requirements. What is and what is not "misbranded" is determined by the definition of that term in 21 U.S.C. 601(n), not by the various interpretations given to the term by the separate states.

(b) The state regulatory scheme invoked by petitioner is preempted, insofar as it applies to wheat flour, by the Labeling Act. That Act provides that "it is the express intent of Congress to supersede any and all laws of the States \* \* \* insofar as they may

now or hereafter provide for the labeling of the net quantity of contents of the package of any consumer commodity covered by this chapter which are less stringent than or require information different from the requirements of section 1453 of this title or regulations promulgated pursuant thereto." 15 U.S.C. 1461.

The court of appeals correctly held that "a state scheme is 'less stringent' than the federal scheme if it permits marketing of packages of flour that do not conform to the federal net weight labeling standards" (Pet. App. 48). Federal law requires that the label contain an accurate statement of net weight, subject to reasonable variations caused by loss or gain of moisture during distribution. Since California law permits the sale of packaged flour whose actual net weight exceeds the labeled net weight, regardless of the cause or amount of the variance, it is to that extent "less stringent than," and consequently superseded by, the federal requirements.

California law is also preempted insofar as it requires, with respect to the net-weight labeling of packaged flour, "information different from" that required by federal law. The information required by California is a statement of the minimum actual weight of the contents at the time of sale—i.e., the labeled weight must equal or understate the actual weight—and no departure from that requirement (in terms of the lot average) is permitted for any reason. That information is "different from" the information required by federal law, which provides for an ac-

curate statement of net weight at the time of packaging and allows reasonable variations thereafter caused by moisture loss during distribution. A package whose contents weigh one pound at the time of packaging but only 15 ounces at the time of sale because of moisture loss during distribution must, under federal law, carry a label showing a net weight of one pound. Under California law, however, the label must show a net weight of 15 ounces or less.

It was precisely to avoid such conflicting requirements with respect to net-weight labeling that Congress expressly superseded state laws requiring information different from that required by federal law. Here, as in the case of the Meat Act, the state requirements must, to the extent of the conflict, yield to the federal under the Supremacy Clause, because "Congress has unmistakably so ordained." *Florida Lime & Avocado Growers, Inc. v. Paul, supra*, 373 U.S. at 142.

3. Petitioner argues (Br. 19-20) that California's net-weight labeling standard is consistent with federal law (and therefore is not preempted) because it "is substantially similar to, and follows the principles of, Handbook 67, published by the National Bureau of Standards" (Br. 19). Even if consistency with a federal standard other than one prescribed under the Meat, Food, or Labeling Act were pertinent to the preemption inquiry in this case, petitioner's argument would fail because it rests on an erroneous premise. The California net-weight labeling requirement at issue here is at odds with the principles of



Handbook 67, as well as with the model state regulation to which the Handbook refers.

Handbook 67 was issued in 1959 by the National Bureau of Standards pursuant to the Bureau's authority (by delegation from the Secretary of Commerce) to "cooperat[e] with the States in securing uniformity in weights and measures laws and methods of inspection." 15 U.S.C. 272(5). The Handbook is "[a] manual for State and local weights and measures officials, describing a method for controlling various types of prepackaged commodities" (33 States Br. App. 5).<sup>7</sup> It is designed in part as a procedural guide for use in enforcing laws and regulations similar to the *Model State Weights & Measures Law* (1975) and the *Model State Packaging & Labeling Regulation* (1975), which have been adopted by the National Conference on Weights and Measures (an organization sponsored by the National Bureau of Standards and composed of state weights and measures officers).<sup>8</sup> The laws and regulations of many states

<sup>7</sup> "33 States Br. App." refers to the appendix to the brief *amicus curiae* of 33 States and Attorneys General, which was filed at the petition stage of this case. The appendix to that brief contains substantial excerpts from Handbook 67, a full copy of which we have lodged with the Clerk of this Court. We have also lodged the current draft of proposed revisions to Handbook 67 (referred to in note 1 and at page 5, *supra*), which was presented for review and comment to the National Conference on Weights and Measures in July 1975.

<sup>8</sup> Copies of the Model Law and the Model Regulation have been lodged with the Clerk.

parallel the Model Law, the Model Regulation, and Handbook 67.

The Model State Law, like the federal statutes and regulations discussed above and unlike the California law enforced by petitioner, provides that the director of weights and measures shall "[a]llow reasonable variations from the stated quantity of contents, which shall include those caused by loss or gain of moisture during the course of good distribution practice or by unavoidable deviations in good manufacturing practice" (Section 5.15). The Model State Regulation—which is intended to be "compatible with appropriate Federal Regulations," including those adopted under the Labeling Act (Foreward)—provides that "[v]ariations from the declared net weight or measure shall be permitted when caused by ordinary and customary exposure to conditions that normally occur in good distribution practice and that unavoidably result in change of weight or measure" (Section 12.1.2).<sup>9</sup>

<sup>9</sup> Both the Model Law and the Model Regulation specify that the reasonable variations shall be allowed only after the commodity is introduced into intrastate commerce. However, the Regulation broadly defines the phrase "introduced into intrastate commerce" to refer to "the time and place at which the first sale and delivery of a package is made within the state, the delivery being either (a) directly to the purchaser or to his agent, or (b) to a common carrier for shipment to the purchaser" (Section 12.1.2). The Regulation would not permit exposure variations "so long as a shipment, delivery, or lot of packages of a particular commodity remains in the possession



Handbook 67 is wholly compatible with these principles. It reflects recognition that "[c]ertain packaged products \* \* \* are subject to gain or loss of weight through the increase or decrease in moisture content, beginning immediately after the packaging occurs" (33 States Br. App. 7). Referring to the provisions of the Model Regulation, the Handbook states that experienced inspectors should "be able to develop procedures for conducting a sound investigation that will result in the building up of working knowledge as to what is 'customary exposure' and what may be considered to be 'good distribution practice' with respect to the packages of an individual commodity that may gain or lose weight through gain or loss of moisture" (*id.* at 7-8).

Handbook 67 is thus in harmony with the net-weight labeling standards under the Meat, Food, and Labeling Acts and not with the standards under California law. California's regulation may prescribe

---

or under the control of the packager or the person who introduces the package into intrastate commerce" (*ibid.*).

The Model Regulation also allows variations from the declared net weight "when caused by unavoidable deviations in weighing, measuring, or counting the contents of individual packages that occur in good packaging practice" (Section 12.1.1). It provides, however, consistent with federal regulations, that "such variations shall not be permitted to such extent that the average of the quantities in the packages of a particular commodity, or a lot of the commodity that is kept, offered, or exposed for sale, or sold, is below the quantity stated, and no unreasonable shortage in any package shall be permitted, even though overages in other packages in the same shipment, delivery, or lot compensate for such shortage" (*ibid.*).

a lot sampling procedure similar to the one suggested by Handbook 67 (see note 4, *supra*). But it differs from the Handbook, as it does from the federal law, in the one respect most relevant to the preemption issue: it fails to allow any variation from stated weight because of loss of moisture during the course of good distribution practice.

It is because of that failure that the California regulation may not properly be enforced with respect to respondents' products.

#### CONCLUSION

The judgments of the court of appeals should be affirmed.

Respectfully submitted.

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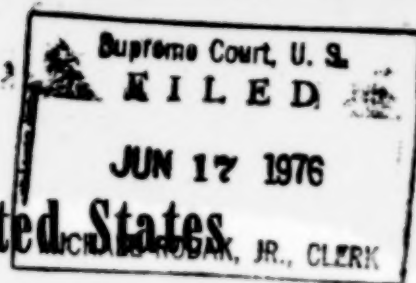
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AUGUST 1976.

IN THE  
**Supreme Court of the United States**



October Term, 1975  
No. 75-1053

JOSEPH W. JONES, as Director of the County of River-  
side, California, Department of Weights and Measures,  
*Petitioner,*

*vs.*

THE RATH PACKING COMPANY, etc., *et al.*,  
*Respondents.*

**On Writ of Certiorari to the United States Court of  
Appeals for the Ninth Circuit**

**Brief of 39 States and Attorneys General as Amici  
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On Writ of Certiorari to the United States Court of  
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Brief of 39 States and Attorneys General as Amici  
Curiae in Support of Petitioner Joseph W. Jones

**Jurisdictional Statement**

This Honorable Court has granted the petition of Joseph W. Jones for a Writ of Certiorari. This brief, *amicus curiae*, is respectfully submitted by the following 39 States, State Officers and Attorneys General pursuant to Rules 42(2) and (4) of this Court: William J. Baxley, Attorney General of *Alabama*; Avrum Gross, Attorney General of *Alaska*; Bruce E. Babbitt, Attorney General of *Arizona*; The State of *Arkansas ex rel.*, Jim Guy Tucker, Attorney General; Evelle J. Younger, Attorney General of *California* and L. T.

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The States, organizations and law enforcement officers listed in footnote 1 support the position of amici set out in this brief.<sup>1</sup>

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<sup>1</sup>The following States, organizations and law enforcement officers support the position of amici curiae:

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*Minnesota* Department of Public Service; William F. Hyland, Attorney General of *New Jersey*; *Pennsylvania* Department of Agriculture, Raymond J. Kerstetter, Secretary; Edward S. Porter, Commissioner of Agriculture for the State of *Tennessee*.

Louis J. Lefkowitz, Attorney General of *New York*, is filing a separate amicus curiae brief in support of petitioners.

*National Organizations:*

American Farm Bureau Federation; Center for Consumer Affairs, University of Wisconsin—Extension, Milwaukee, Wisconsin; National Conference on Weights and Measures; National Consumers Congress; National Grange (the American Farm Bureau Federation and the National Grange together have as members the majority of America's farmers); National Scale Men's Association; Scale Manufacturers Association, Inc.

*Regional and State Organizations:*

Associated Dairymen (California); Associated Milk Producers, Inc.; California Association of Weights and Measures Officials; California Cattlemen's Association; California Citizen Action Group; California Farm Bureau Federation; California State

(This footnote is continued on next page)



### Interest of Amici Curiae

This case presents for resolution by this Court crucial questions concerning the power of the States and the proper relationship between the States and the federal government in our *federal* system.

Grange; Consolidated Milk Producers for San Francisco; Consolidated Milk Producers of Tulare County (California); Consumers Cooperative of Berkeley, Inc.; Federated Dairymen (California); Greenbelt Consumer Services, Inc., Silver Springs, Maryland; Hanover (New Hampshire) Consumer Cooperative Society, Inc.; League of California Milk Producers; Mid-America Dairymen, Inc. (Missouri); Milk Producers Council (California); Producers' Market Milk Association (California); Western Dairymen's Association (California).

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In reviewing two judgments of the United States Court of Appeals for the Ninth Circuit<sup>2</sup> which enjoined application of certain California laws requiring that statements of weight on packaged food products sold to consumers be accurate and truthful, this Court is asked to decide whether certain federal laws<sup>3</sup> have displaced the power of the States to regulate weights and measures to prevent unfair competition and fraud in the marketplace.

The States' power to regulate weights and measures at the time and place of sale predates the Constitutional Convention of 1787 (*Turner v. Maryland*, 107 U.S. 38, 51-55 (1882)) and received explicit approval by this Court at least as early as 1898.

"Where the subject is of wide importance to the community, the consequences of fraudulent

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<sup>2</sup>*The Rath Packing Company v. M. H. Becker, etc., et al.*, 530 F.2d 1295 and *General Mills Inc., et al. v. Jones*, 530 F.2d 1317.

<sup>3</sup>The federal laws in question are the Food, Drug, and Cosmetic Act, 52 Stat. 1040, as amended; 21 U.S.C. § 301 *et seq.*; the Fair Packing and Labeling Act, 80 Stat. 1296; 15 U.S.C. § 1451 *et seq.*; and the Wholesome Meat Act, 81 Stat. 584; 21 U.S.C. § 601 *et seq.* The decision in this case will also materially affect the Poultry Products Inspection Act, 71 Stat. 441 and the Wholesome Poultry Products Act, 82 Stat. 791, which together are set out at 21 U.S.C. § 451 *et seq.* as these Acts contain provisions substantially similar to those of the Wholesome Meat Act which are presented for review (compare, e.g., 21 U.S.C. §§ 453(h)(5) and 467e with 21 U.S.C. §§ 601(n)(5) and 678, respectively.)



practices generally injurious, and the suppression of such frauds matter of public concern, it is within the protective power of the State to intervene. *Laws providing for the inspection and grading of flour, the inspection and regulation of weights and measures*, the weighing of coal on public scales, and the like, are all competent exercises of that power. . . ." *Patapsco Guano Co. v. North Carolina*, 171 U.S. 345, 358 (1898). (Emphasis added.) *Accord Turner v. Maryland*, *supra* at 55.

Our power to prevent unfair competition and fraud and deception in the sale of food products at retail markets within our borders is equally well established. *E.g.*, *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 162 (1942); *Plumley v. Massachusetts*, 155 U.S. 461, 472 (1894).

In contrast with this clearly established reserved power of the States, there are presented the questions (1) whether one or more of the federal statutes in issue preempt California's nondiscriminatory regulation of local markets to assure fair competition and truth in packaging of food products, and (2) whether certain California laws are in irreconcilable conflict with federal laws which have been interpreted (*amici* contend this interpretation is erroneous) to permit sale to consumers and businesses of falsely labeled packaged food products.

The impact of this Court's decision will be significant indeed upon the justifiable expectations of businesses and consumers to receive full measure. Each day our

nation's wholesalers, retailers and consumers buy and sell millions of packages of food and other products.<sup>4</sup> They do so in reliance upon the accuracy of the quantity statements required by government to be placed on those packages. If, as the court below has held, those statements of quantity need no longer be truthful, then unfair competition by sale of short quantity will be encouraged (with purchasers required to pay billions of dollars more to obtain the same amount of product), purchasers will be cheated, commerce will be impeded by the necessity for large purchasers to determine exactly how much less than the stated quantity they are actually purchasing, and—as assuring truth in packaging is a long recognized function of government—our citizens' confidence in their government will be eroded.<sup>5</sup>

The impact of this Court's decision will be equally significant upon the power of the States to forbid false representations in the marketplace and to prevent the detrimental consequences thereof to both consumers and honest businesses.

As important as will be this Court's decision upon the power of the States to protect the welfare of our citizens and to assure them free and honestly

<sup>4</sup>The total annual volume of commerce governed by weights and measures is in excess of \$900 billion. Hearings Before House of Representatives Subcom. of Comm. on Appropriations; Depts. of State Justice, and Commerce, The Judiciary, and Related Agencies, Appropriation for 1975, 93d Cong., 2d Sess., Pt. 3, Commerce at 922.

<sup>5</sup>Examples of the egregious impact upon purchasers—consumers, retailers and other bulk purchasers (including government agencies)—of affirmance of the opinions of the circuit court are set out in Appendix A, *infra* at 1 *et seq.*

competitive markets, there is likely the additional impact resulting from the fact that both the Food, Drug and Cosmetic Act and Wholesome Meat Act apply with equal force to products which are "adulterated" as to products which are "misbranded." Thus, if the Court holds that the States cannot enact or enforce laws requiring truth in label statements of quantity (*i.e.*, forbidding "misbranding"), the Court's ruling could well have the effect of precluding the States from assuring the purity of foodstuffs sold to our consumers. Such a result would indeed represent a fundamental reversal of the powers of the States as provided for in our Constitution and as recognized by this Court.

Amici curiae, as States and their State Officers and Attorneys General charged with the enforcement of honest weights and measures laws and pure food and drug laws, are thus vitally concerned with the issues presented in this case.

### Summary of Argument

The Food, Drug and Cosmetic Act (FDCA) does not preempt the States' traditional role in protecting our citizens from unwholesome, falsely labeled or deceptively packaged food products. The States may enact and enforce laws which require that products be wholesome (*e.g.*, *Cloverleaf Butter v. Patterson*, 315 U.S. 148, 162 (1942)) and especially laws which require that products bear true statements of quantity of the contents when offered for sale (*see e.g.*, *Patapsco Guano Co. v. North Carolina Bd. of Agric.*, 171 U.S. 345, 358 (1898)) so long as such laws do not irreconcilably conflict with the FDCA, which itself requires that consumers receive full quantity and wholesome products. (*Infra* at 15-26.)

The federal Fair Packaging and Labeling Act of 1966 (FPLA) expressly requires true weight to the consumer. 15 U.S.C. §§ 1451, 1453(a). The FPLA preempts only less stringent State label *format* laws, it does not preempt State laws governing the *accuracy* of label statements at retail. Nor does it affect the States' power to enforce our laws, which are more stringent than FPLA requirements and which require true weight to purchasers. (*Infra* at 26-32.)

The Wholesome Meat Act (WMA) contains statutory provisions substantially similar to those of the FDCA, with the exception of section 408 which expressly recognizes the States' *concurrent jurisdiction* to enforce adulteration and misbranding requirements, which are *consistent with* those of the WMA. (*Infra* at 53-55, 58-61.)

WMA section 408 also, *arguendo*, preempts State labeling requirements which differ from federal requirements, but labeling is properly defined as concerning *format* (type size, location, etc.) and not *accuracy*, which is included within the WMA's *misbranding* definition. Thus, the WMA confirms the concurrent jurisdiction of the States to require full measure at retail. This interpretation carries out the Congressional intent to have uniform product labels *and* true weight to the consumer, *and* at the same time recognizes the States' historic role in preventing deception in the marketplace. (*Infra* at 56-58.)

The California weight standard is identical to the federal—true weight to the consumer. The accuracy-on-the-average procedure which petitioner Jones uses is merely a practical means of enforcing compliance with the statutory standard. The circuit court erroneously rejected Jones' use of California's statistically valid en-



forcement procedure. Literally billions of packages are sold upon the basis of their weight. To properly carry out their duties, weights and measures officials must be able to utilize a statistically valid weight testing procedure which enables them to accurately determine the weight of large lots of packages by testing much smaller samples. The circuit court's injunction against Jones' use of a procedure which the district court found to be statistically valid precludes use of such a sensible enforcement tool. Similarly, the lower court's command that a valid enforcement procedure must require that *overweight* packages as well as those which are *underweight* shall be ordered off sale will result in a senseless misallocation of enforcement officials' time. No useful purpose is served by requiring enforcement action against overweight packages even though they may be technically out of compliance. (*Infra* at 32-42.)

Jones' use of California's accuracy-on-the-average testing procedure is in accord with principles promulgated by the National Bureau of Standards (NBS) for use by the States pursuant to Congressional directive. The Environmental Protection Agency (EPA) utilizes a similar accuracy-on-the-average procedure to assure compliance with a statutory standard of accurate weight. (*Infra* at 34-37.)

To interpret the FDCA, FPLA and WMA to permit shortages in products at retail while, under an identical statutory command, EPA requires true weight to the consumer would both create and sanction an egregious

anomaly: *it would compel accuracy in packaged poisons but permit shortages in food (and other) products.* (*Infra* at 19-20.)

To affirm the circuit court's ruling would cause serious harm to consumers, create a severe problem of unfair competition and place substantial impediments upon *effective* enforcement of truth in packaging laws. Consumers, including business purchasers, presently rely upon receiving full measure and value for their purchasing dollar. To lower this standard of accuracy to the "reasonable shortages" nonstandard of the circuit court would allow deliberate shortages and result in purchasers getting less than the amount stated. This would increase costs due to the need to pay more to get that which was originally bargained for, resulting in increased costs to distributors who must pass these costs on to individual consumers.

\$900 billion of commodities are sold upon the basis of weight or measure, a substantial portion of which are packaged products. *Even a one percent decrease in the weight of products at retail could result in an increased cost to the public of billions of dollars.* Thus, the circuit court's sanction of "reasonable" shortages at retail will, if affirmed, have a tremendous inflationary impact. Further, the unfair competitive advantage reaped by one business trying to take advantage of the circuit court's "reasonable shortages" nonstandard would compel his competitors to follow, to the detriment of the public. *Thus this case is about billions of extra dollars which purchasers of food and other products*



would be forced to pay if a standard, other than the longstanding one of full measure to the purchaser, is now imposed. (*Infra* at 43-47.)

Amici urge this Court to confirm the States' power to prevent the fraud and deception which necessarily results from the passing-off of short-measure food (and other) products for full-measure. To force us to lower our standard of accuracy and full measure to the circuit court's nonstandard of short weight would deny us our sovereign police power in an area of vital State concern and importance. (*Infra* at 64-68.)

## ARGUMENT

### I

#### CALIFORNIA LAWS WHICH ASSURE TRUE WEIGHT TO THE PURCHASER ARE NOT IN CONFLICT WITH FEDERAL LAWS

##### A. The Opinions of the Circuit Court

This case presents for review two judgments of the United States Court of Appeals for the Ninth Circuit. In *General Mills, Inc., et al. v. Jones*, 530 F.2d 1317 (1975) (hereinafter *General Mills*), the Ninth Circuit held that (1) California Business and Professions Code section 12211 (hereinafter section 12211) and Title 4 California Administrative Code, chapter 8, subchapter 2, Article 5 (hereinafter Article 5) impermissibly conflict with the standards imposed by the federal Food, Drug and Cosmetic Act (hereinafter FDCA) and by the Fair Packaging and Labeling Act (hereinafter FPLA); and (2) California Business and Professions Code section 12607 (hereinafter section 12607) as implemented by Title 4 California Administrative Code, chapter 8, subchapter 2.1 (hereinafter subchapter 2.1)<sup>6</sup> is also in irreconcilable conflict with FDCA and FPLA standards. 530 F.2d at 1328. The question presented in *General Mills* is thus "whether California's [enforcement] scheme impermissibly *conflicts* with federal law . . . an inquiry different from that where express preemption is involved. *Cf. Campbell v. Hussey*, 368 U.S. 296, 300 (1961)." 530 F.2d at 1325 (emphasis in original). The Ninth Circuit's holding is arguably in conflict with that of the Second Circuit in *General*

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<sup>6</sup>Subchapter 2.1 was promulgated with the intent of complying with the district court's order pending appeal. See nn. 27 and 33, *infra*.

*Mills, Inc. v. Furness*, 398 F.Supp. 151 (S.D.N.Y. 1974) *aff'd*, 508 F.2d 836 (1975). *See infra* at 41-42.

In *The Rath Packing Company v. M. H. Becker, etc., et al.*, 530 F.2d 1295 (1975) (hereinafter *Rath*) the Ninth Circuit held that (1) section 12211 and Article 5 were preempted by section 408 (21 U.S.C. section 678) of the federal Wholesome Meat Act (hereinafter WMA); and (2) section 12607 as implemented by Title 4 California Administrative Code, chapter 8, subchapter 2, Article 5.1 (hereinafter Article 5.1)<sup>7</sup> were similarly preempted by the WMA. 530 F.2d at 1317. Thus the question presented in *Rath* is whether the WMA *preempts* the questioned California laws.<sup>8</sup> This question is not resolved by the Sixth Circuit's ruling in *Armour & Co. v. Ball*, 468 F.2d 76 (1972). *See infra* at 59.

The question of the effect of the FPLA and WMA upon State laws has never been before this Court for plenary hearing; nor has the effect of the 1966 enactment of the FPLA upon the FDCA been presented for review.

To permit a logical presentation of the complex issues in this case and to permit discussion of these issues in the historical perspective of the sequence

<sup>7</sup>Article 5.1 (identical to subchapter 2.1) was also promulgated with the intent of complying with the district court's order pending appeal.

<sup>8</sup>*Rath* has never contended that the California laws were an unreasonable burden on interstate commerce. (Complaint, *passim*.) The contention of *General Mills Inc., et al.* (complaint, *passim*) that the California laws in issue unreasonably burdened interstate commerce was held to be without merit by the circuit court (530 F.2d at 1322). As *General Mills* has not sought review of that holding, no question of its validity now may be raised. *See Michelin Tire Corp. v. Wages*, ..... U.S. .... (1976), 96 S.Ct. 535, 538 n. 2; *cf. Irvine v. California*, 347 U.S. 128, 129 (1954).

of enactment of the federal legislation, amici will discuss first the issues presented in *General Mills*—the FDCA, next the FPLA and the effect of its enactment upon the FDCA, and finally the combined impact of the FDCA and FPLA upon State laws (Section B); we will then discuss the issues presented in *Rath*—the WMA and its impact upon State laws (Section C).

## B. There Is No Irreconcilable Conflict Between the FDCA, FPLA and California's Truth in Packaging Laws

### i. Introduction

In *General Mills* the circuit court held that compliance with the FDCA excused compliance with the more stringent requirements of the FPLA and that the California regulatory plan would be valid only (1) if it imposed a standard *not different than* that set by the FDCA or (2) if it imposed a standard *not less stringent than* that required by the FPLA. The circuit court found the California standard to be both *different than* that required by the FDCA and *less stringent than* that required by the FPLA. 530 F.2d at 1326-27.

Amici contend that products subject to regulation by both the FDCA and FPLA must meet the stricter FPLA standard, that the California standard as implemented through its statistically valid enforcement procedure is not in conflict with the federal standard and that federal law does not preclude supplementary State regulation of products at retail.

### ii. The FDCA Requires Full Measure at Retail

Section 301 of the FDCA, 21 U.S.C. section 331, prohibits the introduction or receipt in interstate

commerce of food that is adulterated or misbranded as well as the adulteration or misbranding of a food which is held for sale (whether or not the first sale) after shipment in interstate commerce.<sup>9</sup>

Section 403(e) of the FDCA, 21 U.S.C. section 343(e), declares that a food is misbranded if it is in package form and does not bear a label containing an *accurate* statement of the quantity of contents.<sup>10</sup>

<sup>9</sup>21 U.S.C. section 331 provides:

The following acts and the causing thereof are prohibited:

"(a) The introduction . . . into interstate commerce of any food . . . that is adulterated or misbranded.

"(b) The adulteration or misbranding of any food . . . in interstate commerce.

"(c) The receipt in interstate commerce of any food . . . that is adulterated or misbranded.

"(k) The adulteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to a food . . . if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded.

" . . . ."

<sup>10</sup>21 U.S.C. section 343, provides:

A food shall be deemed to be misbranded—

" . . . ."

"(e) If in package form unless it bears a label containing . . . (2) an accurate statement of the quantity of the contents in terms of weight. . . . : *Provided*, That . . . reasonable variations shall be permitted . . . by regulations prescribed by the Secretary."

This definition is effectively unchanged from that which has been a part of the FDCA and its predecessor statute, the Pure Food and Drug Act of 1906, 34 Stat. 768.

As enacted in 1906, the Pure Food and Drug Act defined a misbranded food as:

"Third. If in package form, the contents are stated in terms of weight or measure, they are not plainly and correctly stated on the outside of the package." 34 Stat. 771.

In 1913 the Congress amended this section to read:

"Third. If in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight . . . : *Provided, however*, That reasonable variations shall be permitted [by regulations]." 37 Stat. 732. Addition of this proviso permitting reasonable

The statute contains a provision authorizing "reasonable variations" from the statutory command of strict accuracy<sup>11</sup> and the Food and Drug Administration (FDA) has had in force during the pendency of this lawsuit a regulation which requires that net quantity declarations shall be accurate, but which permits those "reasonable variations" which result from two specific causes in manufacture or distribution.<sup>12</sup>

Notwithstanding statutory mention of "reasonable variations," this Court has held that the proviso, now contained in section 403(e), is not a part of the definition of the offense, and thus the substantive requirement is that the quantity of contents shall be accurately stated. *United States v. Shreveport Grain & El. Co.*, 287 U.S. 77, 82 (1932). This is also the position taken by the United States as amicus curiae in the Ninth Circuit in the present case.<sup>13</sup> Thus the Government urged: "[Under the statute] [t]here is no exception for variations, even if reasonable or unavoidable . . . [However] the proviso and regulations operate to miti-

variations did not vary the definition of the offense of misbranding. *United States v. Shreveport Grain & El. Co.*, 287 U.S. 77, 82 (1932), which is discussed in the text *infra* at 17.

<sup>11</sup>See n. 10, *supra*.

<sup>12</sup>The FDA regulation, 21 CFR 1.8b(q) provides:

"The declaration of net quantity of contents shall express an accurate statement of the quantity of contents of the package. Reasonable variations caused by loss or gain of moisture during the course of good distribution practice or by unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large."

<sup>13</sup>*General Mills v. Jones*, brief of the United States as Amicus Curiae, page 7 (set out in Appendix to Brief in Opposition to Petition for Certiorari in Nos. 75-1052 and 75-1053, 6 at 13; hereinafter cited, using the pagination of the Appendix to the Brief in Opposition, as Brief of the United States at .....). See also Appendix to Brief of the United States at 11.



gate this hard-and-fast rule. The mitigation takes place *not by modifying the requirement for accurate labeling, but by exempting from enforcement* those violations which the Secretary [of Health, Education and Welfare] deems to be reasonable *violations*." Brief of the United States at 13. (Emphasis added.)

Thus the FDCA standard is that a packaged food product is in violation of the law unless its label bears a true statement of net quantity whenever inspected; however, FDA may refrain from taking enforcement action when, in the exercise of its prosecutorial discretion, the agency deems a violation to be "reasonable."<sup>14</sup>

When does the FDCA accuracy standard apply? While it would be technically correct to conclude that the net quantity statements on all products subject to this Act must be correct at all points in the chain of distribution, there are some products (*e.g.*, General Mills' flour) which are not packed in leakproof materials and thus for which weight can vary slightly due to leakage or large fluctuations in humidity.<sup>15</sup>

<sup>14</sup>Notwithstanding *Shreveport* and the announced position of the Government in accord therewith, the court below held that the proviso and the regulation did operate to change the statutory standard: "We hold 21 C.F.R. 1.8b(q) is valid and forms part of the federal labeling standard under the FDCA." 530 F.2d at 1324.

Even if this Court should overrule *Shreveport* and hold that the regulation does modify the statutory standard, amici show (*infra* at 38-40 and at n. 64) that State laws (including California's) are not in conflict with the resulting federal standard.

<sup>15</sup>Most differences in humidity have no significant effect upon the weight of products packed in porous materials. See Affidavit of James Robey, *e.g.*, at 2, line 29-3, line 2; Appendix B *infra* at 6 (¶9(b) and (d)) [Cl. Tr. at 306-07] in which he reports upon a survey which revealed that humidity variances between California's arid desert and moist seaside areas produced no significant change in the weight of respondents' packaged flour products.

Thus resolution of this question requires an inquiry into the purpose of the FDCA—the proper answer to the question is given by a determination of what class the statute is intended to protect—consumers and honest competitors using modern procedures, or packers resistant to change and relying upon outmoded practices and who contend they need not give honest weight in any package anywhere in the Nation.

This Court has consistently held that the purpose of the FDCA is to protect and safeguard the ultimate consumer. *United States v. Wiesenfeld Warehouse Co.*, 376 U.S. 86, 92 (1964); *Accord United States v. Dotterweich*, 320 U.S. 277, 280 (1943) ("The purposes of this legislation thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection.") quoted in *United States v. Park*, 421 U.S. 658, 668 (1975). The FDCA requires those who distribute food to be "the strictest censors of their merchandise," *id.* at 671, quoting *Smith v. California*, 361 U.S. 147, 152 (1959).

Thus the critical point for determining whether a weight statement on a non-leak-proof package is accurate is at the time of sale to the consumer; determination solely at the time of packaging would defeat the basic purpose of the statute—protection of purchasers, both businesses and consumers.

Administrative interpretation of an analogous statutory scheme fully supports this conclusion. Thus the Federal Insecticide, Fungicide & Rodenticide Act, 61 Stat. 163, as amended, 7 U.S.C. § 135(a), prohibits distribution in commerce of poisons unless their packages bear a true statement of weight, subject to the proviso that reasonable variations may be provided. This statu-

tory command is implemented by the regulation of the Environmental Protection Agency (EPA) to require full measure *to the purchaser*. Thus 40 CFR section 162.104 provides:<sup>16</sup>

“(e) *Allowance for loss*. A statement of net content ‘when packed’ does not comply with the requirements of the act. The statement must be such that it will be correct as long as the economic poison is subject to the law. Thus, *if a product such as borax may lose weight by drying out when stored in paper bags, it must be packed and labeled in such a way that the statement of net content will be correct when the product is purchased.*”<sup>17</sup> (Emphasis added.)

Thus EPA requires that commodities so packaged as to be subject to moisture loss be either packaged or filled so that the statement of net contents will be correct when the product is purchased.

*It would be anomalous indeed to conclude that, while EPA requires that purchasers of poisons get*

<sup>16</sup>The text of the Federal Insecticide, Fungicide and Rodenticide Act and its weight regulation are set out in Appendix C, *infra* at 9-10.

<sup>17</sup>Handbook 67, the model package weight inspection procedure promulgated by the Secretary of Commerce, National Bureau of Standards for use by the States, also requires accurate weight on the average to consumers and acknowledges “that packers must be allowed to overfill such packages as are susceptible of moisture loss.” *Id.* at 8 (Handbook 67 is reprinted in its entirety in the appendix to amici’s Brief in Support of Jones’ Petition for Certiorari (gray cover); see pp. 5 and 15 thereof).

*true weight, under the FDCA purchasers of food may get short weight.*<sup>18</sup>

iii. The FDCA Does Not Preempt “Different” State Laws

The circuit court held that “by virtue of the ‘savings provisions’ of 15 U.S.C. § 1460, compliance with the FDCA is to be considered compliance with the FPLA. By the same token, any state net weight labeling standard which is *not different* from the standard set forth in 21 U.S.C. § 343(e) and 21 CFR 1.8b(q) cannot be considered ‘less stringent’ than the FPLA standard.” 530 F.2d at 1325-26. (Emphasis in original.)

Amici discuss *infra* at 28-29 the proper construction of 15 U.S.C. section 1460, concluding that compliance with the more stringent FPLA standards is required.

<sup>18</sup>Regrettably both the court below and the Government in its amicus curiae brief in the Ninth Circuit have concluded that short measure should be permitted in food (and other) products. They reach this conclusion by radically different reasoning. The circuit court, having concluded that the Food and Drug Administration (FDA) regulation is part of the statutory offense (530 F.2d at 1324), mistakenly interprets that regulation to permit *every package* to be short weight when offered for retail sale. 530 F.2d at 1327, *i.e.*, shortages to all of the people all of the time. The Government, however, concluded that the FDA regulation is no part of the statutory offense (accord *United States v. Shreveport Grain & El. Co.*, *supra*, 287 U.S. 77, 82 (1932)), but views shortages at retail as required to protect consumers from *overweight* packages (Brief of the United States at 19) and as necessary because the use of proper packaging material imposes a burden on packers (*id.*, at 20).

Amici contend that *proper* consideration for the Congressional purpose of the FDCA requires that purchasers’ interests be given greater weight than those of the packers and that FDA’s discretion to excuse violations should be exercised to facilitate full net quantity and accurate statement of net weight to the consumer or business purchaser, *i.e.*, to permit (or require) packaging so that food products, as are poisons, are true weight when purchased.



What concerns us at this point is the lower court's conclusion that compliance with the FDCA may only be achieved by a state net weight "labeling" standard which is *not different from* the FDCA standard. The circuit court's holding is premised upon an erroneous interpretation of the term "labeling" and is in conflict with prior decisions of this Court validating the power of the States to enact laws differing from the FDCA in our regulation of the sale of foodstuffs to protect our citizens—consumers and businesses—from fraud and deception, and from unfair competition.

*First*, the lower court overlooks an important distinction between the *format* of a label (type, size, placement of information, etc.) and the *accuracy* of that information. It is clear from the FDCA's definition of the terms label and labeling<sup>19</sup> on the one hand and the term misbranding<sup>20</sup> on the other, that the

<sup>19</sup>21 U.S.C. section 321(k) provides:

The term "label" means a display of written, printed, or graphic matter upon the immediate container of any article; and a requirement made by or under authority of this chapter that any word, statement, or other information appear on the label shall not be considered to be complied with unless such word, statement, or other information also appears on the outside container or wrapper, if any there be, of the retail package of such article, or is easily legible through the outside container or wrapper.

21 U.S.C. § 321(m) provides:

The term "labeling" means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article.

<sup>20</sup>21 U.S.C. § 343 provides:

A food shall be deemed to be misbranded—

(a) If its labeling is false or misleading in any particular.  
(b) If it is offered for sale under the name of another food.

See also §§ (c)-(g).

former are concerned with matters related to *format* while the latter relates to assuring that what is stated is *accurate*. Any remaining question on this point is fully resolved by a reading of section 343(n) which clearly distinguishes between the format of what is printed on the label and the *accuracy* of that information.<sup>21</sup>

*Second*, there is no basis for a conclusion that the FDCA precludes State laws which are merely different from the FDCA.

The subject matter addressed by the FDCA—the readying of foodstuffs for market—is a matter of peculiarly local concern. *E.g., Florida Lime & Avocado Growers, Inc., et al. v. Paul*, 373 U.S. 132, 144 (1963).

The FDCA contains no expressly preemptive language and there is no legislative history which indicates an intent to preclude State regulation. To the contrary, as the circuit court acknowledges, "The legislative history of the FDCA shows a regard in the Congress for the exercise of State police power" (530 F.2d at 1325) and the 1938 amendments do not indicate any change in the intent of Congress that the FDCA *does not "interfere in any way with the power of the State officials over local trade but the purpose of the bill is to give to State officials the aid of*

<sup>21</sup>21 U.S.C. section 331(n) provides:

(n) If an article is alleged to be misbranded because the labeling is misleading, then in determining whether the labeling is misleading there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, or any combination thereof, but also the extent to which the labeling fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the article to which the labeling relates under the conditions of use prescribed in the labeling thereof or under such conditions of use as are customary or usual.



the National Government and to receive from the State officials their aid in the enforcement of the national law." H.R. Rep. No. 2118, 59th Cong., 1st Sess., March 7, 1906, quoted at 530 F.2d at 1325. (Emphasis added.)

Indeed the States are free to enact and enforce standards more stringent than those required under the FDCA so long as there results no frustration of the Congressional purpose. Thus, in *Corn Products Refg. Co. v. Eddy*, 249 U.S. 427 (1919), this Court confirmed the power of the States to impose additional requirements upon products subject to the FDCA's predecessor, the Food and Drug Act, validating a Kansas law which required disclosure upon the package labels of syrups of the percentage of each ingredient (*id.* at 431) and thus disclosure of the manufacturer's trade formula notwithstanding the fact that the federal law expressly excepted such "trade secrets" from disclosure. *Id.* at 438-39. And in *Hebe Co. v. Shaw*, 248 U.S. 297 (1919), this Court upheld an Ohio law which, to prevent the passing off of a lesser quality product for pure condensed milk, forbade the sale of a milk compound. In so holding the Court rejected a claim (*see id.* at 298-99) that the State law offended the Pure Food and Drug Act, saying through Mr. Justice Holmes, "The Food and Drugs Act . . . does not prevent state regulation of domestic retail sales [citations omitted]." *Id.* at 304.

Replacement in 1938 of the Pure Food and Drug Act by the FDCA has not changed this Court's view of the role of the States. Thus in 1942, in *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, this Court confirmed the power of a State (at least in the absence of an express contrary command of Congress) to confis-

cate or exclude from its markets processed butter which had complied with all the federal processing standards if that food failed to meet the *higher* standards demanded by a State for its consumers. Indeed the Court stated that such a higher standard "is permissible under all the authorities." *Id.* at 162. *See also Florida Lime & Avocado Growers Inc., et al. v. Paul, supra*, 373 U.S. 132, 144-45 (1963).<sup>22</sup>

And earlier in this term (1975), this Court again noted the authority of a State to require that a food which had traveled in interstate commerce must meet the State's own standards. *Great Atlantic & Pacific Tea Co., Inc. v. Cottrell*, ..... U.S. ...., 96 S.Ct. 923, 930-31 (1976), citing *Dean Milk Co. v. Madison*, 340 U.S. 349, 355 (1951).

It is therefore clear beyond question that unless the State laws in issue objectively and seriously frustrate the achievement of the Congressional purpose underlying the federal legislation they must be upheld, notwithstanding any additional regulation which they may impose upon food products subject to both federal and state laws.

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<sup>22</sup>Even prior to enactment of the Pure Food and Drug Act in 1906, this Court said:

"In the execution of its police powers we admit the right of the State to enact such legislation as it may deem proper, even in regard to articles of interstate commerce, for the purpose of preventing fraud or deception in the sale of any commodity and to the extent that it may be fairly necessary to prevent the introduction or sale of an adulterated article within the limits of the State." *Schollenberger v. Pennsylvania*, 171 U.S. 1, 14 (1898).

As the authorities cited in the text demonstrate, enactment of the Pure Food and Drug Act and the FDCA has not substantially altered this necessary power of the States.

For the circuit court to conclude that the FDCA precludes the States from imposing more stringent requirements was clearly error.

**iv. Products Subject to Both the FDCA and FPLA Must Meet the Higher Standards of the FPLA**

In 1966 the Congress enacted the FPLA, 80 Stat. 1296, 15 U.S.C. section 1451 *et seq.*, and in so doing made this declaration of congressional policy: “*Informed consumers are essential to the fair and efficient functioning of a free market economy. Packages and their labels should enable consumers to obtain accurate information as to the quantity of contents and should facilitate value comparisons. . . .*” *Id.* § 2. (Emphasis added.)

The FPLA forbids the distribution in commerce of any packaged consumer commodity unless in conformity with regulations

“... which shall provide that—

(2) The net quantity of contents . . . shall be separately and *accurately* stated in a uniform location upon the principal display panel of that label. . . .” *Id.* § 4, 15 U.S.C. § 1453. (Emphasis added.)

This section also prescribes that certain other information shall be contained upon package labels.<sup>23</sup>

<sup>23</sup>The information required to be placed upon labels of packages subject to the requirements of the Act include the *terms* in which statements of weights shall be expressed (pounds and fractions thereof), the *manner* in which the statement of weights shall appear (“conspicuously and in easily legible type in distinct contrast . . . with other matter on the package”), the *size* of letters and numerals and the *placement* of all such writing. *Id.* § 4, 15 U.S.C. § 1453.

This section also expressly forbids appearance of any words or phrases which qualify a unit of weight or tend to exaggerate the amount of the commodity contained in the package.

The Circuit Court concluded that the FPLA set a standard of “strict accuracy.” 530 F.2d at 1326 n.4, 1327. Amici concur in *that* holding, as it is the only conclusion consistent with the language of section 1453(a) (an *accurate* statement of weight) and with the congressional purpose of this legislation—to enable *consumers* to obtain *accurate* information as to the quantity of contents.<sup>24</sup>

The FPLA also provides that any consumer commodity which is a food, drug, device or cosmetic, as each of these terms is defined by the FDCA and which is *in violation of the FPLA*, “shall be deemed to be misbranded within the meaning of [the FDCA].” *Id.* § 7, 15 U.S.C. § 1456(a). (Emphasis added.)

<sup>24</sup>It should be noted that the FPLA does not allow the adoption of regulations permitting “reasonable variations.” In contrast to the express delegation of authority to prescribe such variations given in the FDCA (21 U.S.C. § 343(e)) (which variations nevertheless do not vary the statutory offense, *United States v. Shreveport Grain & El. Co.*, *supra*, 287 U.S. 77, 82 (1932)), in enacting the FPLA the Congress specifically prescribed that regulations adopted under the authority of the FPLA shall require that the net quantity of contents shall be “*accurately* stated.” 15 U.S.C. § 1453(a)(2).

This prohibition of regulations permitting “reasonable variations” may be viewed as confirmation of the intent of Congress that accurate weight to the consumer is a vital part of the FPLA (*accord* FPLA § 2, 15 U.S.C. § 1451) and as Congressional recognition of this Court’s holding in *Shreveport*, *supra*, that the reasonable variations proviso does not alter the definition of the offense of misbranding. FPLA § 5, 15 U.S.C. section 1454, which makes reference to regulations to be adopted under the FPLA, does not grant authority to permit “reasonable variations.” While a regulation allowing “reasonable variations” would be permissible under the authority granted to FDA by the FDCA, products subject to both the FDCA and FPLA must nevertheless meet the *stricter and later enacted FPLA* requirement of strict accuracy. FPLA § 7, 15 U.S.C. § 1456(a) (discussed in the text, *infra*). (Thus, FDA’s adoption of 21 CFR 1.8b(q) upon the asserted authority of the FPLA (32 Fed. Reg. 10729, col. 3, July 21, 1967) was erroneous.)



Thus the scope of the FPLA overlaps that of the FDCA, prescribing specific requirements for information which is to be disclosed on labels of food products which are consumer commodities<sup>25</sup> (as are the products in the present case) and makes an act proscribed by the FPLA a violation of the FDCA.

The Circuit Court held that "by virtue of the 'savings provisions' of 15 U.S.C. § 1460, compliance with the FDCA is to be considered compliance with the FPLA." 530 F.2d at 1325. Thus the court below concluded that compliance with the FDCA excuses compliance with the more stringent and specific FPLA requirements. Amici contend this holding is error.

FPLA § 11, 15 U.S.C. § 1460, provides:

"Nothing contained in this Act shall be construed to repeal, invalidate, or supersede—

". . . .

"(b) the Federal Food, Drug, and Cosmetic Act. . . ."

While that statement can fairly be taken to mean that the FDCA is not superseded by the FPLA, it cannot be construed to excuse compliance with FPLA standards where both FDCA and FPLA requirements are applicable.

This result is compelled by (1) section 1456(a) which, as noted above, specifically makes a violation of the FPLA, violation of the FDCA, (2) the definition of consumer commodity to expressly include "any food, drug, device, or cosmetic (as those terms are defined by the Federal Food, Drug, and Cosmetic Act)" (FPLA

<sup>25</sup>The term consumer commodity is defined in section 10 of the FPLA, 15 U.S.C. section 1459(a).

§ 10, 15 U.S.C. § 1459(a)), (3) the contrasting exemption from coverage by the FPLA of meat and poultry and certain other items (*id.* 15 U.S.C. § 1459 (a)(1)-(5)), and (4) the Congressional statement that the purpose of the FPLA is to provide *maximum* protection to consumers. (*Id.* § 2, 15 U.S.C. § 1451.)

Thus, while a food product misbranded under FDCA standards is subject to action pursuant to that law, the same food product is subject to action if it violates the more stringent FPLA standard.<sup>26</sup>

**v. The FPLA Does Not Preempt State Laws Requiring That Package Weight Be Accurate When Sold to Consumers**

Amici have set forth *supra* at 15-20 and 26-29 the reasons why the FPLA must be considered to require accurate weight to the consumer.

Assuming *arguendo* that the FPLA does not by its own terms require true net quantity to the consumer, the Act nevertheless expressly permits enforcement of State laws which are not less stringent than the federal law.

Thus, FPLA section 12, 15 U.S.C. section 1461 provides:

"It is hereby declared that it is the express intent of Congress to supersede any and all laws of the States or political subdivisions thereof inso-

<sup>26</sup>The legislative history of the FPLA does not elucidate the Congressional intent concerning section 11, 15 U.S.C. section 1460. Neither the Senate Report (No. 1186, 89th Cong., 2d Session) nor the Conference Report (No. 2286) even refer to section 11. 3 1966 U.S. Code Cong. & Admin. News 4069. The sole reference to section 11 is contained in the message of the President of the United States transmitting this and other proposed legislation. Referring to section 11, the President stated only "There are no changes in existing law" and proceeded to note the text of § 11. *Id.* at 4086.



far as they may now or hereafter provide for the *labeling* of the net quantity of contents of the package of any consumer commodity covered by this chapter which are *less stringent than or require information different from* the requirements of section 4 of this Act, [section 1453 of Title 15] or regulations promulgated pursuant thereto." (Emphasis added.)

The lower court interprets this language to expressly permit State laws which impose a standard which is not less stringent than that of the FPLA. (530 F.2d at 1324-25.)<sup>27</sup> Thus California and her sister States are free to enact and enforce laws requiring true weight to consumers and businesses even if federal laws do not impose the same standard.<sup>28</sup>

<sup>27</sup>Although the circuit court says that State laws not less stringent than the FPLA are not necessarily preempted (*e.g.*, 530 F.2d at 1325), in applying this test the court below interprets section 12 so that there is *in fact* preemption of all State laws which are *different than* the FPLA standard. Further, although the lower court states that the FPLA requires strict accuracy (*id.* at 1326), it *interprets* the standard to require "reasonable" shortages.

Thus in discussing subchapter 2.1, the California regulation (now superseded) which was meant to apply pending resolution of this controversy and which required true weight in each package—a standard not less stringent than the FPLA standard announced by the circuit court, the lower court states "... simultaneous compliance with federal law and [the California regulation] is made physically impossible by California's failure to recognize reasonable variations from label weight as permitted by 21 CFR 1.8b(q). *Id.* at 1328.

The circuit court is inaccurate as well as inconsistent. Its construction of section 12 simply ignores the not "less stringent than" language of the statute—language which clearly permits enforcement by means such as subchapter 2.1.

<sup>28</sup>The legislative history of the FPLA supports this conclusion. Senate Report No. 1186 (89th Cong., 2d Sess.) states:

Section 12 provides that regulations promulgated under the act shall supersede State law only to the extent that the States impose net quantity of contents labeling require-

Moreover, even assuming *arguendo* that section 12 precludes the States from imposing label *format* requirements which differ from those of FPLA, it does not preempt State laws requiring that those labels be *accurate*.

In this regard we consider first the definition of the term "label".

FPLA section 10, 15 U.S.C. section 1459(c) provides:

"The term 'label' means any written, printed, or graphic matter affixed to any consumer commodity or affixed to or appearing upon a package containing any consumer commodity."

That label *format* is distinct from the *accuracy* of "graphic matter" is seen by the separately stated requirement of FPLA's section 4, 15 U.S.C. section 1453(a) (2), prescribing that such graphic matter must be *accurate*.

Second, the legislative history of the FPLA, Senate Report No. 1186 (89th Cong., 2d Session) lists the specific practices which were sought to be remedied.

ments which differ from requirements imposed under the terms of the act. *The bill is not intended to limit the authority of the States to establish such packaging and labeling standards as they deem necessary in response to State and local needs.* (Emphasis added.)

This is not to say that the Congress was not justifiably concerned with *accuracy* of package weight representations, but only that any preemption was expressly limited to labeling *format* and does not extend to *accuracy*.

Accuracy is covered by a different section of the FPLA, section 4, 15 U.S.C. § 1453, which contains no preemptive language. *Cf. Atlantic Ocean Products, Inc. v. Leth*, 292 F.Supp. 615 (D. Ore. 1968) *aff'd*, 393 U.S. 127 (1968), in which the court held that § 1461 did not preclude the State of Oregon from regulating the accuracy of product names even though the descriptive name used was part of the package label.

Each of these practices (*e.g.*, *inconspicuous* net quantity statements)<sup>29</sup> is concerned with label *form* and *not accuracy*. Nowhere in the legislative history of enactment of the FPLA is there any criticism of state enforcement of net quantity *accuracy requirements*, much less any suggestion that the FPLA was intended to debase the preexisting standard of accuracy at time of sale—the statutory language and legislative history are both to the contrary.

Third, the policy basis for the FPLA is the protection of consumers and providing them with *accurate* information as to quantity of contents. 15 U.S.C. § 1451. There is no conflict between this policy of assuring *accuracy* at time of purchase and that requiring uniform national label *format* standards.

Thus while the States, *arguendo*, may be restrained from imposing requirements as to type, size or color or as to other aspects of label *format*, FPLA section 12 does not preclude us from requiring that what is set out on those labels is *accurate* when the product is sold to our consumers and businesses.

**vi. The California Laws in Issue Do Not Impermissibly Conflict With Federal Law**

Amici have established, *supra*, that federal law requires true net quantity to the consumer and business purchaser. We now establish that the relevant California statutes and regulations achieve this same standard and do so by means of a practical, statistically valid enforcement procedure; thus the California laws are not in conflict with their federal counterparts.

<sup>29</sup>The listing of practices sought to be remedied is reprinted in Appendix C, *infra* at 11-12.

**(a) California Law Requires True Weight to the Consumer**

California Business and Professions Code section 12024 sets the standard for sales of all goods in California. It provides:

“Every person, who by himself, or through or for another, sells any commodity in less quantity than he represents it to be is guilty of a misdemeanor.”

This standard is restated in the California Fair Package and Labeling Act (CFPLA), Calif. Bus. and Prof. Code section 12600, *et seq.* Thus, Calif. Bus. and Prof. Code section 12603(b) forbids distribution of packaged consumer commodities which do not contain *accurate* weight statements.<sup>30</sup>

Thus the California standard is identical to federal law. 15 U.S.C. § 1453(a)(2); 21 U.S.C. § 343(e); *cf. United States v. Shreveport Grain & El. Co.*, *supra*, 287 U.S. 77, 82 (1932).

Also involved in this case is the enforcement procedure used by California. Proper evaluation of that procedure depends upon understanding its background and purpose, subjects now discussed.

Literally billions of packages of consumer commodities are sold every year, each containing upon its label a representation of the quantity of net contents. The responsibility placed upon State and local weights and measures officials to assure purchasers of the

<sup>30</sup>The CFPLA is patterned after the FPLA, expressing the same purpose—protecting purchasers against deception and providing consumers accurate information as to quantity of contents. Compare Calif. Bus. & Prof. Code §§ 12601-12605 with 15 U.S.C. §§ 1451-1453.



accuracy of such label weight statements (and of other label representations) is equally immense. It is simply not possible for even the comparatively large staff of trained and equipped State and local weights and measures inspectors to inspect each package offered for sale.

Recognizing both the enormity of the problem of how to verify package weight statements for hundreds of thousands of different products and the need for a solution which is at the same time fair to the packer and the purchaser, in 1959 the United States Department of Commerce, National Bureau of Standards (NBS) published a handbook for checking Pre-packaged Commodities by State officials. (Handbook 67.)<sup>31</sup>

Handbook 67 is based upon a well recognized, valid statistical law—that the weight of a group (lot) of homogeneous product can be accurately determined by inspection of a portion (sample) of the packages which comprise the lot.

As promulgated by NBS, the application of this fundamental law of statistics has three key elements: (1) individual packages are permitted reasonable varia-

<sup>31</sup>Handbook 67 is published under the Congressional grant of authority to the Secretary of Commerce (64 Stat. 371, 15 U.S.C. § 272(5)) to cooperate "with the States in securing uniformity in weights and measures laws and methods of inspection."

It should not be overlooked that the Congress has continued to fund NBS activities—including a proposed revision of Handbook 67 (which carries forward the principles discussed in this brief)—in part in express recognition of the fact that "In the United States, regulatory authority for the enforcement of weights and measures laws and regulations rests with State and local jurisdictions." Hearings on Departments of State, Justice and Commerce, The Judiciary and Related Agencies Appropriation for 1976, House Committee on Appropriations, 94th Cong. 1st Sess., pt. 4 at 572-73. *Id.* for 1975, pt. 3 at 922-23.

tions (both plus and minus), (2) the lot is considered to meet the statutory standard so long as its *average net quantity is at least* the amount stated upon the packages, and (3) *packagers are permitted to overpack to compensate* for variations in weight due to loss of moisture. Handbook 67 specifically authorizes net quantity to be determined on an average basis, requires packers to overfill such commodities as are susceptible of moisture loss, and recommends legal action only when the average weight of the lot is less than the standard required.

Similar statistical procedures utilizing this accuracy-on-the-average principle are used by federal agencies to determine compliance with statutory standards calling for absolute accuracy in each item. For example, as discussed, *supra* at 19-21, EPA has interpreted a statute (7 U.S.C. § 135(a)) which requires that label statements of weight be accurate, subject to regulations which permit reasonable variations, to require accurate-weight-on-the-average. 40 CFR § 162.104. (Appx. C, *infra*, at 9-10.) EPA's regulation is based upon a similar USDA interpretation. (Interpretation No. 6 of the Regulations for the Enforcement of the Federal Insecticide, Fungicide and Rodenticide Act, February, 1965.)

Further the EPA regulation and Handbook 67 require that commodities subject to moisture loss be packaged so that the statement of net contents will be correct when the product *is purchased*. 40 CFR section 162.104 (e); Handbook 67, p. 8, § 8, Step 3; set out in Appendix to Brief Amicus Curiae in support of Petition for Certiorari at 15.

The policies in favor of determining adherence to a strict accuracy standard by use of an averaging



procedure are persuasive. While it is clear that the standard enforced is true net quantity to the purchaser, it is equally obvious that *not even all of the resources of all of this nation's weights and measures officials combined would be sufficient to inspect each package of every commodity produced which bears a weight representation.*<sup>32</sup> Rather, adherence to this truth in labeling standard depends upon the good faith packers—encouraged by sensible enforcement. It is equally apparent that a procedure which enables a weights and measures official to determine with accuracy the weight of thousands of packages by inspecting only a portion of those packages meets both the packer's right to fair treatment and the enforcement official's time and budgetary constraints. No right-thinking person would insist upon package by package inspection of a lot of 5,000 packages when modern statistics provide a valid procedure to determine the net quantity of those packages by inspecting only a sample. Thus, when a federal or State statute calls for accuracy and when a large number of packages must be inspected for compliance with that standard, it is logical *and* practical *and* fair to enforce that standard by use of a valid, statistical procedure which utilizes the accuracy-on-the-average standard.

<sup>32</sup>The total impracticality of the package by package inspection procedure imposed by the circuit court is demonstratively evident from this, typical example. The State of Hawaii exported 5,365,680,000 cans of pineapple products in 1974. To require package by package inspection of just this one commodity to verify the accuracy of the label weight statements would require that each of 5,000 employees weigh 350,000 cans per year or 1,000 cans per day or 125 cans per hour or 2 cans per minute.

Use of a statistically valid lot inspection procedure such as California's Article 5 or Handbook 67 (*see text infra*) would accomplish the same task in literally a fraction of the time and with a far more efficient use of enforcement officers' time.

The Handbook 67 procedure was adopted after thorough consultation with weights and measures officials and representatives of the packaging industry and has received widespread acceptance in industry (which uses similar average accuracy procedures) as well as being used by most of amici curiae.

The California enforcement procedure, Article 5, use of which the district court enjoined,<sup>33</sup> was adopted in 1960 and is based upon the same principles as Handbook 67—inspection by lots, determination of compliance by accuracy-on-the-average and requiring enforcement action only when the average weight of a lot inspected is less than the weight stated. These procedures were adopted pursuant to the authorization in California Business and Professions Code section 12211.<sup>34</sup>

The district court found Article 5 to be statistically valid. 357 F.Supp. at 533. The circuit court accepted that finding. 530 F.2d 1301.

<sup>33</sup>The circuit court broadened the district court's injunction to include subchapter 2.1, the State enforcement procedure adopted after the district court voided the federal regulation. In order to comply with the circuit court's holding pending review in this Court, subchapter 2.1, has been superseded and amici do not discuss it, except as it may bear upon other aspects of the circuit court's holding and to note that subchapter 2.1, an enforcement procedure commanding strict accuracy in each package, was voided by the circuit court in part because it required removal from sale of only underweight packages. The circuit court held subchapter 2.1 to offend the FPLA as it did not require enforcement action against overweight packages. 530 F.2d at 1328. That holding does not protect anyone, defies reasonable application of the law and would require wholly unnecessary expenditures of time and money to remove from sale technically out of compliance, but otherwise unobjectionable, overweight packages. The circuit court's rejection of subchapter 2.1 is neither compelled nor suggested by a fair reading of the FPLA. It also results in higher costs to packagers and therefore to purchasers.

<sup>34</sup>The text of Cal. Bus. & Prof. Code § 12211 is set out in Appendix C, *infra*, at 13-15.

Thus the California standard is true weight to the consumer which, out of the practical necessities discussed *supra*, is enforced by use of the accuracy-on-the-average procedure approved and recommended by NBS, the federal agency with expertise in weights and measures.

(b) *The California Standard Is Not in Conflict With the Federal Standard*

The circuit court held that section 12211 and Article 5 establish a net weight standard (1) different than that established under the FDCA (relying entirely upon the discussion in the same court's opinion in the *Rath* case) (530 F.2d at 1326), and (2) less stringent than that required by the FPLA (*Id.* at 1326-27.)<sup>35</sup> Each of these holdings is error.

First, the circuit court's holding of difference between State and federal law is predicated upon its erroneous belief that 21 CFR 1.8b(q) is part of the definition of the offense of misbranding under the FDCA. This conclusion is contrary to *United States v. Shreveport Grain & El. Co.*, *supra*, 287 U.S. 77, discussed *supra* at 17-18, in which this Court held that the proviso for reasonable variations is not part of the offense of misbranding under the FDCA. Even if that de-

<sup>35</sup>The circuit court also holds that Cal. Bus. & Prof. Code § 12607 is less stringent than the federal standard for the reason that Calif. Bus. & Prof. Code § 12614 expressly recognizes causes for variations in addition to those permitted by the federal regulation. There is at least one flaw in the court's analysis: § 12614 was repealed four years before the complaint in this action was filed. 1969 Calif. Stats., ch. 1309, p. 2643, § 2.

The court concludes, however, that § 12613 prevails over § 12614 (530 F.2d at 1327) and thus the lower court's failure to observe the repeal of the other statute is not crucial to the court's holding.

cision is to be overruled, the circuit court still fails to recognize that products subject to both the FDCA and FPLA must meet the stricter FPLA standard of true weight to the consumer. (Discussed *supra* at 26-29.)<sup>36</sup>

Second, the circuit court is in error in its conclusion that section 12211 and Article 5 set a *standard*—they do not; they represent only an enforcement procedure for achievement of the statutory standard by use of a practical, common-sense, equitable approach. See Handbook 67 and *Cf. United States v. Shreveport Grain & El. Co.*, *supra*.

Third, as the California laws in question (§ 12211 and Article 5) are only a *procedure* to determine compliance with the California statutory *standard* of true net quantity to the purchaser (§§ 12024, 12603 (b))—the same standard as that required by the FPLA (530 F.2d at 1326, n. 4)—they are not less stringent than that of federal law.<sup>37</sup>

The circuit court's contrary conclusion is predicated upon its erroneous view that California's testing of

<sup>36</sup>And assuming, *arguendo*, that products which would otherwise be subject to both the FDCA and FPLA are subject to regulation under FDCA standards alone, then the circuit court applied the wrong test, that of *difference* from the federal law. As is clear from the authorities cited by amici *supra* at 23-26, (1) the proper test is whether the State and federal laws are in *irreconcilable conflict* and (2) there is no such conflict in this case.

<sup>37</sup>The circuit court also criticizes Article 5 because the variations which it may permit could be greater than those permitted by 21 CFR 1.8b(q). 530 F. 2d at 1326-27.

First, the lower court is inconsistent, as earlier in its opinion it holds that the FPLA demands "the strict standard of accuracy." *Id.* at 1326 n. 4.

Second, the variations recognized by Article 5 are dependent upon the variations *within* the lot of product inspected, so that they cannot be based upon extraneous factors as the circuit court implies.



compliance by use of an averaging procedure and the limiting of enforcement actions to lots which are short-weight amount to a material alteration of the federal standard. *Id.* at 1326. That conclusion is simply erroneous and wholly ignores the impossible burden which it places upon enforcement officials—whether federal or State.

As amici have set out *supra* at 35-36, the use of practical enforcement procedures is crucial to efficient use of the States' limited resources. It defies logic and sound policy to compel action where there is no material injury—compelling enforcement action against overweight packages is hardly an enlightened view of prosecutorial discretion—and must be rejected. The circuit court's command that California must act against overweight packages as well as those which are underweight simply does not give any weight to the practical necessities of weights and measures enforcement, but rather commands a misallocation of limited resources.

Fourth, packers can and must be required to so package and fill their products so that the purchaser receives full measure.

Properly interpreted to carry out their shared Congressional purposes, both the FDCA and FPLA assure accuracy at the consumer level. Any variations in weight sanctioned by statute or judicial construction must be those necessary to achieve this purpose and statutory command. This is the reason why Handbook 67 permits overpacking and this is the basis for EPA's command in its regulation that products which may lose weight must be packaged so that the statement of quantity will be accurate *when purchased*. The circuit court's

conclusion that the federal laws preclude overpacking so that the consumer will not be deceived is supported neither by law nor policy. See *City of Seattle v. Goldsmith*, 131 P.2d 456, 458-59 (1913); *But see Overt v. State*, 260 S.W. 856, 858 (1924).

Nor is the lower court factually correct. The circuit court's reliance upon the district court record is unduly selective. While there is evidence that California is a state of climatic differences, there is also empirical evidence that humidity is not so extreme that it would create the burden which the circuit court envisions (530 F.2d at 1327)<sup>38</sup> but which the district court must have considered and found so insignificant that it did not even mention in its opinion. *Id.* at 1329-30.<sup>39</sup> (See affidavit of James W. Robey [Cl. Tr. at 305; Appendix B, *infra* at 4].)

Finally, the decision below is contrary to the principles affirmed by the second circuit in *General Mills*,

<sup>38</sup>The requirement that packers ascertain and prepare their products for the distribution process is proper and fair. Processors of milk and other dairy products (all subject to the FDCA and FPLA) must package their products to minimize bacteria growth and cannot successfully complain when their products are removed from retail sale because they do not meet the wholesomeness standards of the State in which they are sold. *Great Atlantic & Pacific Tea Co., Inc. v. Cottrell*, *supra*, .... U.S. ...., 96 S.Ct. 923, 930-31 (1976). There is no greater burden imposed when the subject regulated is misbranding.

<sup>39</sup>This court has previously sustained a local ordinance which requires "overpacking" to meet a local regulation, the purpose of which is to prevent deception in the sale of food-stuffs. Thus, in *Schmidinger v. Chicago*, 226 U.S. 578 (1913), the Court noted that it was not unreasonable for Chicago to require extra dough to be scaled so that, *when sold*, the baked bread would be the standard weight of 16 oz. *Id.* at 586, 588.

*Schmidinger* also points up the obvious answer to both the bakers' and the millers' problem—wrap the product so that it will not lose moisture. There is an obvious benefit from doing so—it preserves the quality of the product.



*Inc., et al. v. Furness*, 398 F.Supp. 151 (S.D. N.Y. 1974), *aff'd*. 508 F.2d 836 (1975). In *Furness* the court rejected General Mills' contention that the FDCA and FPLA preempted a New York City ordinance regulating the weight of prepackaged commodities. In so doing the court (1) upheld use of Handbook 67 as a means of establishing *prima facie* violations of the New York City net weight ordinance and (2) rejected the millers' argument that the City's activities in assuring honest weights and measures were preempted by the FPLA.

The opinion of the court below stands in stark contrast to that affirmed by the Second Circuit.

The Second Circuit affirmed the use of a lot averaging system; the Ninth Circuit rejected use of such a system. The New York court predicated its opinion upon the recognition that weights and measures enforcement is inherently a matter of local concern; the Ninth Circuit found that the FPLA preempted State activity and all but eliminated California's power to prescribe permissible variations.

Amici contend that the validation of use of Handbook 67 evidences a proper concern for practical, effective weight testing procedures. As the California procedure utilizes the same principles as Handbook 67, its use should not have been voided by the lower court. Nor is there any basis for the circuit court's conclusion that the California standard and procedure impermissibly conflict with their federal counterparts.

**vii. Affirmance of the Circuit Court's Holding Would Have a Substantial, Adverse Effect Upon Consumers, Honest Businesses and Upon the States' Ability to Enforce Truth in Packaging Laws**

The circuit court's invalidation of a weight testing procedure which utilizes the NBS Handbook 67 principles of true weight on-the-average and the focusing of enforcement action upon lots which are shortweight, is of substantial concern to amici as we use either Handbook 67, Article 5, or a procedure based upon the same principles. Thus, invalidation of the particular procedure in question would cast doubt upon our ability to use a similar procedure. We cannot properly discharge our duty to prevent false weight statements in the marketplace if we must abandon a statistically sound method of inspection; nor does it make sense to be compelled to order off-sale overweight packages.

The impact of the circuit court's holding is not limited, however, to problems of enforcement procedure. As dramatic as would be the impact of the lower court's opinion, if affirmed, upon the enforcement ability of the States, of even more serious concern is its impact upon consumers, including businesses.

This impact is a direct consequence of the circuit court's holding that "reasonable" shortages must be permitted. Substitution of this nonstandard of "reasonable" shortages in each package for the present standard of true weight to the purchaser will harm not only the retail consumer-homemaker, but will in fact be felt severely, and in the first instance, by our nation's wholesalers and retailers who buy in packages of larger

unit size. The baking company which buys flour in sacks labeled "50 lbs. Net Wt." and the chain store that buys thousands of boxes of meat cuts similarly marked are entitled to receive full measure. If the merchant receives less, he must pay an additional sum to make up the difference. (The baker cannot simply add water to his recipe to compensate—the quality of his product and thus his business will suffer the adverse consequences.) And, just as the merchant-purchaser must pay the "extra" sum to buy the wheat to which he was entitled, *he must also pass that cost (with markup) on to the consumer.*<sup>40</sup>

These additional costs—to purchasers, both merchants and consumers—will be staggering. NBS has estimated that \$900 billion of products are sold annually on the basis of weight.<sup>41</sup> This means that for every one percent shortage, businesses as well as consumers must pay billions of dollars for something they do not receive. Even if the seller gives the buyer a price "reduction" to offset the shorter measure, purchasers must still spend billions of extra dollars to purchase that which they thought they were getting initially.

Thus, if the present system which requires true weight to the consumer and business purchaser is replaced by one permitting absolute shortages in each package, there will be serious inflationary consequences.

There will also be serious anti-competitive effects. A packer who can reduce his price to a retailer, making it up by putting less in the package, can steal the

<sup>40</sup>See appendix A, *infra* at 1-3, for examples of the impact of affirmance of the circuit court's holding.

<sup>41</sup>See n. 4, *supra*.

unknowing customers of his competitors.<sup>42</sup> In order to meet the price break of the less than scrupulous industry member, his fellows will be forced to follow suit or lose their market share. Once the standard of true weight to the consumer is breached, there is no way of controlling the consequences.

There are also practical enforcement problems not discussed previously. The circuit court would depart from the single national standard of true weight to the purchaser, substituting the supposed standard of "reasonable" shortages in each package.

Can such a "standard" be enforced? *Absolutely not!* There is no way a weights and measures inspector can know the manufacturing capabilities and procedures or practices of the hundreds of thousands of domestic packagers let alone the capabilities or procedures or practices used in the scores of foreign countries which export products to the United States. Moreover, there is no sound reason why each time a package is found to be short weight, the weights and measures inspector should be forced to become sufficiently acquainted with those manufacturing procedures, practices or other factors as would be necessary to determine whether the shortages found were "reasonable."

Packers know the capability of their machinery and the characteristics of their products. They place the weight statements on their packages fully expecting purchasers to rely upon them and derive the benefit of the sale of their products as they mark and market them. Further, they know the distribution pattern for their products and can ascertain the expected loss of product weight (whether from leakage or other-

<sup>42</sup>See Appendix A, *infra*, at 1 for examples of the method by which this anti-competitive practice is carried out.



wise) prior to sale. It is therefore not unreasonable to require that packers and manufacturers shall overcome any such loss by proper packaging and filling.<sup>43</sup>

Finally, as there is no feasible manner in which the standard imposed by the circuit court can be enforced by the States, there would be no enforcement at all. FDA simply does not have the staff to do the job. Federal inspectors do not examine packages at retail. *General Mills v. Furness, supra*, 398 F.Supp. at 153. And regrettably FDA's record of enforcement of even federal adulteration standards has been less than adequate.

Senate Report No. 94-684 (94th Cong., 2d Sess.) (1976) contains a disquieting description of FDA enforcement problems:

" . . . [A]fter having spent over \$6.5 million to determine the extent of the mushroom crisis, FDA revealed that in fiscal year 1974 it *could not* conduct 10,000 food sanitation inspections in priority industries such as the fish, shellfish, dairy, and grain product industries. This disclosure coupled with a GAO report which showed that in 1972 food plants were inspected by the FDA on an average of *only once every 5 to 7 years* demonstrated the need for an expanded inspection effort and accompanying regulatory reform to facilitate that effort.

" . . .

"In 1972, a GAO report [fn. omitted] revealed that between 1969 and 1971, 3,300 firms *refused to cooperate with FDA inspectors 10,000 times* when they were asked to make processing records accessible to the agency. The lack of cooperation

<sup>43</sup>See nn. 38 and 39 *supra*.

by many manufacturers often prevents FDA from making valid assessments of whether violations of the Act occur, and even when violations are discovered, *reinspections and followup actions are not always feasible because FDA's inspection resources are so limited. Sanitation violations are often left uncorrected because FDA has neither the time nor the money with which it can effect legal action.* Even when instituted, corrective actions are not without difficulty. For example, according to GAO, the average time required to remove a violative product from the stream of commerce through seizure was 54 days, and when seizures were attempted, *adulterated or misbranded food products were often found to have been removed from the premises before FDA could take effective action.* GAO also found that good faith reliance upon a processor's promise that he would voluntarily withhold products from shipment had more than not, proven unwarranted." *Id.* at 4. (Emphasis added.)

Moreover FDA does not have the authority to detain either adulterated or misbranded products pending commencement of libel proceedings. See 21 U.S.C. § 334.

Amici do not wish to be critical of FDA. We do want, however, not to be enjoined from protecting our citizens from fraud in the marketplace.

To affirm the circuit court's allowance of "reasonable" shortages would seriously frustrate our ability and our efforts to protect the legitimate expectations of our citizens and their justifiable reliance upon their government to enable them "to obtain *accurate* information as to the quantity of . . . contents and . . . [to] *facilitate* value comparisons." 15 U.S.C. § 1451.



viii. The Federal "Reasonable Variations" Regulation Does Not Set an Ascertainable or Enforceable Standard; the States Cannot Be Restricted by an Unascertainable Federal Requirement<sup>44</sup>

Amici contend that because the FPLA requires full measure and accurate net quantity statements to purchasers<sup>45</sup> the federal "reasonable variations" regulation, 21 CFR 1.8b(q), cannot validly alter this standard. *Supra* at 26-29. Amici also contend, upon the authority of *United States v. Shreveport Grain & El. Co.*, *supra*, 287 U.S. 77 (1932), that this regulation does not affect the statutory definition of the offense of misbranding under the FDCA. *Supra* at 17-20.

The lower courts in the present case held, however, that the reasonable variations proviso of the FDCA did constitute a permissible delegation of the Congressional power to *redefine* the offense of misbranding. Further the circuit court read into the FPLA a similar, substantive reasonable variations proviso. *Supra* at 38-39 and n. 37. The district court held that the Secretaries of Agriculture and Health, Education and Welfare had failed to exercise their power properly, holding the regulations in question to be void for vagueness. 357 F.Supp. at 534; 530 F.2d at 1330; *see id.* at 1308-12. The circuit court concurred in the district court's validation of the power to delegate but also found that the particular regulations in issue were valid, reversing the district court. *Id.* at 1324.

<sup>44</sup>Amici discuss at this point both the FDCA-FPLA and WMA regulations providing for "reasonable variations" because their terms are virtually identical (*see supra* at n. 12 and *infra* at n. 53) and as they present the same issues of nonenforceability and effect upon State powers.

<sup>45</sup>Amici also contend that if the FDCA standard is lower than that of the FPLA, the latter must prevail. (*See supra* at 26-29.)

Assuming, *arguendo*, that the circuit court's overruling of *Shreveport* is appropriate and that the statutory standard under the FDCA, FPLA and WMA is true weight subject to reasonable variations, amici contend that the present regulations, 21 CFR 1.8b(q)<sup>46</sup> and 9 CFR 317.2(h)(2),<sup>47</sup> do not set an ascertainable standard to govern *either* packers' or enforcement officials' conduct.

First, there is no way in which an enforcement official—whether federal or state—can apply the non-standard of these regulations to determine whether product is to be removed from sale, or criminal proceedings commenced for misbranding. (*See* 21 U.S.C. §§ 333 and 676 providing for criminal penalties for violations of the FDCA and WMA respectively.) The district court correctly pointed out the problem: "Under the regulation as it is written one meat inspector may conclude that x% loss of moisture can be expected. Given the same factual context, another meat inspector may come to the conclusion that y% loss of moisture is reasonable. Delegation of 'administrator's function' has never included giving each enforcement officer the 'keys to the jailhouse'." *The Rath Packing Co. v. M. H. Becker, et al.*, 357 F.Supp. 529, 534, n. 3 (C.D. Cal. 1973.) Nor is there any standard upon which a packer can rely.

The irony of the circuit court's action is that weights and measures laws are no longer to be enforced by weighing, measuring or counting. The circuit court destroys the prior, long standing and justifiable reliance—by enforcement official and packer alike—upon both

<sup>46</sup>The test of this regulation is set forth *supra* at n. 12.

<sup>47</sup>The text of this regulation is set forth *infra* at n. 53.

a definite standard and scientific sampling plans (such as NBS Handbook 67 and Article 5) to objectively and fairly determine compliance with that standard.

*Second*, the circuit court was simply wrong in relying upon the test of the "ordinary negligence case" (530 F.2d at 1309, 1324) to reinstate the regulations in issue. The determination of what conduct is to be subjected to criminal sanctions must depend upon either a standard clearly set forth in a regulation or upon a standard ascertainable by a meaningful referent. *United States v. Cohen Grocery Co.*, 255 U.S. 81, 86 (1921); *accord United States v. National Dairy Corp.*, 372 U.S. 29, 36 (1963).

In the instant case the district court correctly determined that there was no such standard or meaningful referent. The trial court specifically found that (1) the regulation on its face failed to set an ascertainable standard and (2) there was no uniform standard for use by enforcement officers. (357 F.Supp. at 534.) Yet the circuit court wholly ignored these findings by the trial judge and reinstated the regulation without giving it any meaningful referent.

In order to so hold, the circuit court had to ignore (1) prior rulings of this Court, cited above, which compel the conclusion that the regulations as reinstated are void for vagueness; (2) a clear opportunity to construe the regulations in question in the manner (a) authorized by the National Bureau of Standards, (b) adopted by USDA and EPA, (c) in fact utilized by virtually all of the States; and (3) the published concession by the Food and Drug Administration that its regulation was not sufficiently definite.<sup>48</sup>

<sup>48</sup>FDA has itself expressly acknowledged that its reasonable variations regulation is indefinite. Thus, in adopting a set of

Thus the court below both ignores a construction of the regulation which would have a meaningful referent and ignores decisions of this Court which compel the conclusion that the regulation is void for vagueness.<sup>49</sup>

regulations including the one in question at 32 FR 10729 (July 21, 1967), FDA specifically acknowledged its responsibility to promulgate *specific standards* for determining whether any variation is reasonable or unreasonable. To this end the FDA Commissioner stated:

"7. Proposed § 1.8b(q) is revised and calls for the net quantity statement to express an accurate statement of the quantity of contents of the package."

Then, after stating the terms of the regulation, the Commissioner continued:

"At a later date the Commissioner will propose an amendment to section 1.8b(q) to specify a means whereby industry and State and Federal Government may make a *definitive determination whether any variation is reasonable or unreasonable.*" 32 FR at 10730. (Emphasis added.)

Thus, while FDA, the agency charged with interpretation of the regulation in issue, has acknowledged that it has not sufficiently defined the enforcement standard, the court below sustains that very regulation. *See also*, n. 24, *supra*.

<sup>49</sup>In validating the regulation the court below relied in large part upon this court's decision in *United States v. Shreveport Grain & El. Co.*, *supra*, 287 U.S. 77 (1932). However, as the District Court points out, 357 F.Supp. at 534, *Shreveport* does not reach the question presented in the instant case: the redelegation to each USDA compliance officer of deciding whether in "his judgment" a variation (caused by an unknown) is or is not "reasonable."

The circuit court also relies heavily upon validation by Congressional inaction: "Forty-two years of Congressional silence is strong evidence that Congress has acquiesced in the Secretary's interpretation of the scope of his powers." 530 F.2d at 1312.

First, the logic of this assertion is questionable—even long-standing acquiescence in unconstitutional activity cannot correct constitutional infirmities.

Second, Congressional inaction may, in fact, stand for approval of the States' activity in this field.

Third, the absence of Congressional action on any question is hardly evidence of more than the inherent complexity and slowness of the legislative process. *See National Petroleum Re-*

(This footnote is continued on next page)



*Third and of vital importance*, notwithstanding the first and second points, *there is no way in which the States can enforce these federal regulations*. How can State enforcement officials know what FDA and USDA's interpretations of reasonable variations would be in each of millions of specific cases? Must each weights and measures inspector telephone Washington, D.C., or even a federal regional office, each time he or she finds a short-measure package to get the authorization to remove that package or lot from sale?

An affirmative answer to this question means the end of effective weights and measures enforcement and the end of the power of the States to act in this sphere of traditionally State concern. Nor is there any way State (or federal) inspectors can know what went on inside a packing plant in another State or in a foreign country, making determinations of what is "good manufacturing practice" extremely difficult, if not impossible.

Clearly the case law under the FDCA and the Congressional recognition in the Wholesome Meat Act of the *concurrent jurisdiction* of the States to enforce misbranding requirements (21 U.S.C. § 678, *see infra* at 58-61) must mean that the States may apply our own enforcement procedures so long as they are not in irreconcilable conflict with federal law.

*finers Assn. v. F.T.C.*, 482 F.2d 672, 695-97 (D.C. Cir. 1973), *cert. denied* 415 U.S. 951 (1973), citing *Power Reactor Development Co. v. Int. Union of Elec. Radio & Machine Wks.*, 367 U.S. 396, 409 (1961) (imputing Congressional ratification to a disputed administrative construction of its powers is "shaky business." In the instant case it is an assertion resting upon quicksand). And as the Congress has never had the occasion to review by legislative change the Secretary of Agriculture's enforcement of the Wholesome Meat Act, citation by the court below of *Red Lion Broadcasting Co. v. F.T.C.*, 395 U.S. 367, 381 (1969) and *Flood v. Kuhn*, 407 U.S. 258, 283 (1972) is inapposite.

The circuit court clearly erred in holding that California's enforcement procedure, even if, *arguendo*, it sets a standard, is in irreconcilable conflict with federal law.

To submerge State enforcement efforts in a sea of vague, if not void, lesser federal nonstandards is to remove one of the States' fundamental powers and frustrate one of our basic responsibilities. Amici contend that such a revolution was not intended by Congress—it should not be permitted by this Court.

### C. The Wholesome Meat Act Does Not Preempt State Laws Requiring True Weight to the Consumer

The Wholesome Meat Act (WMA) amendments of 1967 (81 Stat. 584 *et seq.*; 21 U.S.C. § 601 *et seq.*) constituted a major revision of federal involvement in the regulation of meat and meat food products in or affecting interstate commerce, first codified in the Federal Meat Inspection Act of 1907 (34 Stat. 1260 *et seq.*).

The most significant aspect of the WMA was the establishment of the program of federal financial assistance to State meat inspection programs to assure that local programs enforce standards at least equal to those enforced in plants subject to federal inspection. (Title III.)<sup>50</sup>

The WMA amendments also incorporated for the first time the term "misbranded," following the FDCA definition. Other terms, including definitions of the terms label and labeling, also are either the same as, or substantially similar to, those used in the FDCA.<sup>51</sup>

<sup>50</sup>The other major revisions in this statute are set out in Senate Report No. 799, 90th Cong., 1st Sess., 2 1967 U.S. Code Cong. & Admin. News 2188 *et seq.*

<sup>51</sup>*Id.* at 2195-97.



The statutory schemes of the WMA and FDCA are not, however, identical. The most significant difference relevant to the present discussion is the inclusion in the WMA of section 408, 21 U.S.C. § 678, which adds preemptive language not present in the FDCA and different from that used in § 12 of the FPLA. The principal issue to be resolved in the *Rath* case is the effect, if any, of § 408 upon the well-established and recognized power of the States to assure our consumers of the wholesomeness of meat and meat food products and of the accuracy of representations made upon packages of such products.

WMA § 408 (21 U.S.C. § 678) provides:

“ . . . any State . . . may, *consistent with the requirements under this Act, exercise concurrent jurisdiction* with the Secretary over articles required to be inspected under [this] title, for the purpose of preventing the distribution for human food purposes of any such articles which are adulterated or misbranded. . . .” (Emphasis added.)

Section 408 also provides:

“Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this Act may not be imposed by any State . . . with respect to articles prepared at any establishment under inspection in accordance with the requirements under title I of this Act. . . .”<sup>52</sup>

<sup>52</sup>Amici have set out these particular provisions in this manner so that the Congressional statement of concurrent jurisdiction will not be obscured. Section 408 in its entirety provides:

“Requirements within the scope of this Act with respect to premises, facilities and operations of any establishment at which inspection is provided under title I of this Act, which are in addition to, or different than those

The circuit court held State laws requiring *accuracy* in package label statements were preempted by the clause of section 408 which precludes different State *labeling* requirements. 530 F.2d 1295, 1313-14. The lower court also held that the United States Department of Agriculture (USDA) regulation permitting reasonable variations, 9 CFR 317.2(h)(2),<sup>53</sup> altered the absolute accuracy standard of the WMA (*id.* at 1314) and that California law differs from the WMA and is therefore invalid. *Id.*

made under this Act may not be imposed by any State or Territory or the District of Columbia, except that any such jurisdiction may impose recordkeeping and other requirements within the scope of section 202 of this Act, if consistent therewith, with respect to any such establishment. Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this Act may not be imposed by any State or Territory or the District of Columbia with respect to articles prepared at any establishment under inspection in accordance with the requirements under title I of this Act, but any State or Territory or the District of Columbia may, consistent with the requirements under this Act, exercise concurrent jurisdiction with the Secretary over articles required to be inspected under said title, for the purpose of preventing the distribution for human food purposes of any such articles which are adulterated or misbranded and are outside of such an establishment, or, in the case of imported articles which are not at such an establishment, after their entry into the United States. This Act shall not preclude any State or Territory or the District of Columbia from making requirement or taking other action, consistent with this Act, with respect to any other matters regulated under this Act.”

<sup>53</sup>This regulation, which is substantially identical to 21 CFR 1.8b(q), provides:

The statement as it is shown on a label shall not be false or misleading and shall express an accurate statement of the quantity of contents of the container exclusive of wrappers and packing substances. Reasonable variations caused by loss or gain of moisture during the course of good distribution practices or by unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large.

Amici contend that each of these conclusions by the circuit court is erroneous. Indeed, while the statutory schemes of the WMA and the FDCA are in many instances parallel, there are reasons peculiar to the WMA which lend additional support to amici's contention.

i. **The WMA Does Not Preempt State Laws Requiring Accuracy to Purchasers**

(a) *The WMA Preempts Only Differing State Laws Concerned With Label Format*

The circuit court summarily concluded that the term labeling included accuracy. 530 F.2d at 1313, 1314. Assuming, *arguendo*, that Congress may prescribe a uniform national labeling standard, amici contend that the Congress specifically limited its preemption to label *format* only.

Acceptance of amici's position is compelled by the manner in which the terms label and labeling, on the one hand, and misbranding, on the other, are defined; and by the purposes of the WMA itself.

*First*, the terms label and labeling are defined in the WMA separately from the term "misbranding." (Compare 21 U.S.C. §§ 601(o) and (p) with 21 U.S.C. § 601(n)(1-12).) Thus the term label means a *display* of written, printed, or graphic matter upon the immediate container (not including package liners) of any article. 21 U.S.C. § 601(o). And the term labeling means "all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article." 21 U.S.C. § 601(p).

By contrast, a product is "misbranded" if it is in a package "unless it bears a label showing . . . (B) an *accurate* statement of the quantity of contents in terms of weight . . ." 21 U.S.C. § 601(n)(5). (Emphasis added.)

The definition of the terms label and labeling emphasize display and graphics, *i.e.*, *form* and format, while the definition of misbranding is concerned with the *accuracy* of that information. Also, in common parlance, labeling refers to the text and its placement while misbranding refers to the accuracy of label texts. The circuit court's contrary conclusion—that misbranding and labeling are one in the same (530 F.2d at 1313, 1314) fails to appreciate this logical and important distinction.

*Second*, the position advanced by amici is fully supported by policy considerations. While under our interpretation the States cannot impose additional requirements of different placement of information upon a label, or require different type size, we may *verify* the veracity of the representations made therein.

For example, if a product label claims that it is 100% beef, a State could not additionally require that this particular phrase be set apart from, or be in contrasting color to, the rest of the information on a label meeting USDA's format criteria; but State (as well as federal) inspectors could check the product to determine the *accuracy* of this claim. Or, to borrow an example from the FDCA, the States clearly have the right to reinspect a bottle of "100% Pasteurized, Vitamin D. Milk" to assure its wholesomeness and the accuracy of its label. *Cf. Great Atlantic & Pacific Tea Co. v. Cottrell, supra*, .... U.S. ...., 96 S.Ct. 923, 930-31 (1976).



Amici's interpretation gives full weight to the need for uniform national label format standards and equally full consideration to the *far more important* policy objective of assuring the *accuracy* of those representations both as to misbranding and adulteration.<sup>54</sup>

(b) *The WMA Confirms the Concurrent Jurisdiction of the States to Enforce the WMA by Consistent State Action*

Section 408 specifically confirms the concurrent *jurisdiction* of the States to exercise authority over articles subject to the WMA once they are outside the packing plant. The sole statutory restriction upon this jurisdiction is that its exercise be "consistent with" WMA requirements.<sup>55</sup>

There are crucial distinctions between this language and that relating to marking, labeling, packaging and ingredient requirements. First, this concurrent *jurisdiction* clause does not contain an absolute prohibition against different State laws, rather it says State standards must only be "*consistent with*" WMA requirements. Second, this clause expressly recognizes the concurrent *jurisdiction* of the States. Use of the word *jurisdiction* cannot be considered insignificant. Rather, giving proper appreciation for the terms which the Congress used, it must be concluded that the Congress intended to continue the jurisdiction of the States over foodstuffs—an area of traditional State concern, *e.g.*, *Florida Lime*

<sup>54</sup>The legislative history of the WMA and of the analogous Poultry Products Inspection Act (*see* n. 3, *supra*) note only that the terms under discussion are essentially the same as in the FDCA. Senate Report No. 799 (90th Cong., 1st Sess., 2 1967 U.S. Code Cong. & Admin. News 2188, 2196); House Report No. 1333 (90th Cong., 2d Sess.) 3 1968 U.S. Code Cong. & Admin. News 3426, 3445).

<sup>55</sup>The text of § 408 is set out, *supra* at n. 52.

& *Avocado Growers Inc., et al. v. Paul, supra*, 373 U.S. 132 (1963)—to the greatest extent possible, restricting that authority only as absolutely necessary.

Indeed this construction is entirely consistent with that of the only other appellate case construing § 408. In *Armour v. Ball*, 468 F.2d 76 (1972), the Sixth Circuit specifically confirmed this broad interpretation of the authority of the States. *Id.* at 84.<sup>56</sup>

Had the Congress wished to additionally restrict the authority of the States over adulteration and misbranding, *e.g.*, to preclude State misbranding or adulteration standards which are "in addition to or different than" federal requirements, it clearly had the language close at hand.

To the contrary the Congress unequivocally confirmed the *jurisdiction* of the States over misbranding and adulteration and emphatically made it *concurrent*.<sup>57</sup>

<sup>56</sup>Of equal importance is the fact that the Michigan law there considered imposed an *ingredient* requirement different than that established by USDA—requiring 12% protein as opposed to the USDA standard of 11.2% (*id.* at 82) and imposed label *format* requirements (*id.* at 88). No label *accuracy* requirements were enjoined (or apparently in issue). *See id.* at 88. Thus *Armour v. Ball* is not contrary to the position advanced by amici.

<sup>57</sup>The legislative history of § 408 is consistent with amici's position that the States have broad power concerning adulteration and misbranding.

Thus Senate Report No. 799 (90th Cong., 1st Sess.) states:

Section 408 would exclude States, territories, and the District of Columbia from regulating operations at plants inspected under title I or from imposing marking, labeling, packaging, or ingredient requirements in addition to or different than those under the Federal Meat Inspection Act for articles prepared under inspection in accordance with title I of the act, but would permit them to impose recordkeeping and related requirements with respect to such

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Nor do the Congressional debates on enactment of the WMA support a finding of preemption.<sup>58</sup> Rather, the absence of either legislative language, history or debate referring to removal from the States of our well established power to protect our citizens in these fields, must carry the implication that no such revolutionary restriction was intended.

What is the scope of the States' authority? Reference to an additional section of the WMA lends persuasive support to the conclusion that the States' latitude is as broad under the WMA as it is under the FDCA, *i.e.*, that the States, in the interest of protecting the health and welfare of our citizens, are limited in our activities only by the constitutional test of "frustration of congressional purpose."

Thus WMA § 402, 21 U.S.C. § 672, expressly provides for detention of products by federal officials<sup>59</sup> when there is reason to believe that such articles are adulterated or misbranded in violation of

plants if consistent with the Federal requirements and to impose requirements consistent with the Federal provisions as to other matters regulated under the act.

2 1967 U.S. Code Cong. & Admin. News 2188 at 2207. (Emphasis added.)

The circuit court also concluded that the States had broad authority over misbranding (530 F.2d at 1314), but defined this term improperly to include both label format and accuracy. See *supra* at 56-58.

<sup>58</sup>It is well recognized that Congress will not preempt any State power without debate, certainly it will not create a revolution overruling basic, long-established principles of commerce. The Congress contains many individuals who are always ready to do battle on behalf of State power; they surely would have raised their voices in opposition to any expression of Congressional intent to preempt. Further discussion of the Congressional debates may be found in Appendix C, *infra* at 15 *et seq.*

<sup>59</sup>Enforcement activities by State officials are sanctioned by § 403, 21 U.S.C. § 673 and by § 408.

the WMA, or of "any other Federal law or the laws of any State."<sup>60</sup> (Emphasis added.) *Accord* 9 CFR 329.1; House Com. on Agr., H.R. 11789 and Section by Section Analyses—A Bill to Amend the Meat Inspection Act, 89th Cong., 1st Sess., Oct. 28, 1965 at 27; Senate Report No. 799, 90th Cong., 1st Session, 2 1967 U.S. Code Cong. & Admin. News, 2188, 2207.

Thus in *United States v. 500 Pounds, etc.*, 319 F. Supp. 966 (N.D. Cal. 1970) the court interpreted § 672 as including situations in which a product is in violation of valid *State law*, even if not in violation of federal law.

## ii. The WMA Requires True Weight to the Consumer

In enacting the WMA the Congress expressly declared its purpose to be the protection of consumers and competitors. 21 U.S.C. § 602; *accord Federation of Homemakers v. Hardin*, 328 F.Supp. 181, 184 (D.C. 1971) *aff'd*. 466 F.2d 462 (1972). Thus amici's discussion *supra* of FDCA and FPLA principles is equally applicable to the WMA.

Additionally, in defining misbranding under the WMA the Congress followed closely its FDCA definition<sup>61</sup> but made permissive rather than mandatory the adoption of regulations providing for reasonable variations. Thus, in enacting the WMA the Congress gave express recognition to this Court's holding in

<sup>60</sup>The text of § 672 is set forth in Appendix C, *infra* at 12-13.

<sup>61</sup>Section 2 of the WMA, 21 U.S.C. § 601(n)(5) makes a product subject to the WMA misbranded "if in a package . . . unless it bears a label showing . . . an accurate statement of the quantity of the contents in terms of weight. . . . Provided, That . . . reasonable variations may be permitted . . . by regulations prescribed by the Secretary." (Emphasis added.) *Cf.* n. 10 *supra*.

*United States v. Shreveport Grain & El. Co.*, *supra*, 287 U.S. 77 (1932) that the reasonable variations proviso is not part of the statutory offense.

Thus the WMA's prohibitions against distribution of adulterated food are absolute, as are those of the FDCA upon which the WMA amendments are patterned. The wholesale or retail sale of adulterated or misbranded meat food products is absolutely prohibited.

And thus the USDA regulation concerning reasonable variations, 9 CFR 317.2(h)(2)<sup>62</sup> cannot, as the circuit court erroneously concluded (530 F.2d at 1314), vary the offense of misbranding.

iii. **The California Statute Is Consistent With the WMA Standard**

In *Rath* the California laws found to violate the circuit court's interpretation of the WMA standard are identical to those discussed, *supra*, in connection with *General Mills*.<sup>63</sup> Thus the arguments presented, *supra* at 32-42, conclusively establish that (1) the California standard is identical to the federal standard—true weight to the purchaser—consumer or business,

<sup>62</sup>The text of the regulation is set out *supra* n. 53.

<sup>63</sup>These laws are discussed *supra* at 37-39. The circuit court also considered Calif. Bus. & Prof. Code § 12607 and Article 5.1, which was adopted after the district court's invalidation of the federal reasonable variations regulation. (357 F. Supp. at 534.)

As Article 5.1 has been superseded, its consideration may be viewed as a moot question. Even if still viable for purposes of this case, its validity depends upon whether § 408 permits or precludes States from enacting and enforcing laws which are *consistent with* even though technically "different from" WMA requirements and upon other considerations, all of which are discussed in the text, *supra*, and which would govern the special case of Article 5.1. For these reasons, amici do not separately discuss this regulation.

(2) it is logical and practical and fair to enforce this standard as to the billions of packages which are subject thereto by a statistically valid enforcement procedure which utilizes the principles of accuracy-on-the-average and only requires further action where there is a serious problem, *i.e.*, when the lot inspected is found to be shortweight.<sup>64</sup>

iv. **Affirmance of the Circuit Court's Judgment Would Have a Serious Impact Upon the Nation's Consumers**

The impact of affirmance of the circuit court's opinion in *Rath* is not substantially different from that of an affirmance of the *General Mills* judgment. Meat food products account for a large share of the \$900 billion of products sold annually by weight or measure.

Further, the effect upon State enforcement is no less severe. Indeed, the officer in charge of the USDA Western Region Compliance Staff testified at the trial in case No. 72-607-R (the companion case to the Jones action) that he has only 7 compliance officers for the 12 western states (including Alaska and Hawaii); that these officers have *neither the training nor the equipment* to make the necessary retail level inspections and that *in fact USDA relies upon the States and upon state procedures to determine whether product is misbranded* (shortweight). [Cl. Tr. at 371-84.] It should be clear from the evidence that it is only by means of the enforcement action of Jones

<sup>64</sup>Even if *Shreveport* is no longer considered controlling and 9 CFR 317.2(h)(2) is considered to vary the definition of misbranding, California's regulatory scheme and enforcement procedure are still *consistent with* WMA requirements as they carry out the purpose of the WMA in a manner which does not frustrate the Congressional purpose. *Cf. Cloverleaf Butter Co. v. Patterson*, *supra*, 315 U.S. 148, 162 (1942); *Corn Products Refg. Co. v. Eddy*, *supra*, 249 U.S. 427, 438-39 (1919). See section IBviii *supra* at 48-53.



and other State and local weights and measures officials that the federal standard of true weight at retail is enforced. To accept the circuit court's holding that the federal standard is true weight subject to an undefined "reasonable variation—i.e., "reasonable shortages" to the consumer—would impose an unenforceable nonstandard—it would compel local weights and measures officials to guess at what USDA would consider reasonable. This approach is hardly sensible when the NBS, the federal agency charged by Congress with coordinating States' weights and measures enforcement, has provided us with a method of determining with certainty and applying with uniformity, a known standard. It is ironic indeed for the Ninth Circuit to conclude that weight and measure cannot be determined by weighing and measuring.

A holding requiring the States to guess about what USDA might do *if* it had trained and equipped personnel would seriously impede the exercise of our duty to prevent deception in the sale of food products.

## II

### CALIFORNIA'S TRUTH IN PACKAGING LAWS ARE A VALID EXERCISE OF ITS RESERVED POLICE POWERS

Amici contend that a proper balancing of State and federal interests compels the conclusion that the California laws in issue are a valid exercise of the police power of the States.

The Tenth Amendment to the United States Constitution provides:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

While this Amendment is not a limitation upon the authority of the federal government to enact such legislation as is necessary and proper to the exercise of a power granted to it by the Constitution, it is a guarantee to the States that powers not granted are reserved to the States and that the States may fully implement our reserved powers except to the extent such State action conflicts with the proper exercise of a power granted to the federal government. *See, e.g., United States v. Darby*, 312 U.S. 100, 119-24 (1941).

That the Tenth Amendment may be characterized as "but a truism" (*id.* at 124) does not lessen its importance as confirmation of the nature of our government as *federal*, with both delegated and reserved powers. *See, e.g., Cooley v. Board of Wardens*, 53 U.S. (12 How.) 318, 341 (1851).

"The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system. . . ." *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975).

This Court has repeatedly affirmed that among those powers described as police powers which were not delegated to the national government but are reserved to the States is the power to prevent fraud and deception in the sale of foodstuffs. Thus, in *Plumley v. Massachusetts*, 155 U.S. 461 (1894), in affirming the power of a State to forbid the sale of imitation butter in a manner which would permit confusion and the passing off of imitation butter for real butter,<sup>65</sup> this Court stated:

<sup>65</sup>The police power extends beyond the power to prevent deception and fraud to the securing of our citizens "against the consequences of ignorance and incapacity."



"If there be any subject over which it would seem the States ought to have plenary control, and the power to legislate in respect to which it ought not to be surrendered to the general government, *it is the protection of the people against fraud and deception in the sale of food products.*" *Id.* at 472. (Emphasis added.)

Indeed the States' power to assure honesty in weights and measures predates our Constitution (*Turner v. Maryland, supra*, 107 U.S. 38, 51-55 (1882)) and has been repeatedly confirmed by this Court.

"Where the subject is of wide importance to the community, the consequences of fraudulent practices generally injurious, and the suppression of such frauds matter of public concern, it is within the protective power of the State to intervene. *Laws providing for the inspection and grading of flour, the inspection and regulation of weights and measures, the weighing of coal on public scales, and the like, are all competent exercises of that power. . . .*" *Patapsco Guano Co. v. North Carolina*, 171 U.S. 345, 358 (1898). (Emphasis added.)

*Accord, e.g., Schmidinger v. Chicago, supra*, 226 U.S. 578 (1913) (laws "tending to prevent frauds and requiring honest weights and measures in the sale of articles of general consumption, have long been considered lawful exertions of the police power." *Id.* at 588); *see Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 202 (1824) (the power to enact inspection and health laws is reserved to the States); *see also Florida Lime & Avocado Growers Inc., et al. v. Paul, supra*, 373 U.S. 132, 144 (1963).

If our *federal* system is to have vitality, if the States are not to be made into mere administrative appendages of an all-powerful national (not *federal*) government, then full weight must be accorded the interests of the States in resolving any alleged conflict between the exercise of granted and reserved powers. The resolution of any alleged conflict should depend upon proper consideration of the legitimate interests of each governmental unit and a determination of whether in fact there exists an insurmountable conflict.

In the present case the interests of the federal government are the protection of purchasers—consumers and businesses—from misbranded packages and from unfair competition, enabling consumers to make accurate value comparisons, and assuring the free flow of commerce among the States.

The interests of the State of California are identical to those of the federal government—the assurance of truth in packaging, providing purchasers with information vital to the making of informed purchasing decisions and assuring the prosperity of commerce within the State.

As there is no question but that the State laws in issue are applied in a nondiscriminatory manner, it must be concluded that the State and federal objectives are in concert. Nor can it be overlooked that the FDA and USDA are ill-prepared to implement these shared objectives as their enforcement staffs are minimal and without either adequate training or necessary equipment. By contrast, California and amici States are adequately staffed with well trained and properly equipped personnel.

Amici submit that when these facts are considered together with the fact that the regulation of weights

and measures is traditionally a matter of local concern, the only proper conclusion is the validation of the States' power to enforce truth in packaging laws and Jones' power to enforce the laws in issue. A contrary result would not advance any federal interest and would only lessen the protection of consumers and of honest competition which the Congress intended.

As this Court has stated on more than one occasion, "The Constitution of the United States does not secure to anyone the privilege of defrauding the public." *Plumley v. Massachusetts*, *supra*, 155 U.S. 461, 479; *Patapsco Guano Co.*, *supra*, at 361.

The sale of food products bearing false statements of net quantity is a particularly egregious violation of this principle. Its sanction by a federal agency raises questions in the minds of consumers as to whether there has been a proper balancing of consumer's and packager's interests. And the frustration by the lower court in this case of the exercise by California of its police power to prevent such deception raises at least as serious questions about the continuing vitality of the States in our federal system of supposedly shared powers.

Amici submit that a proper respect for the role of the States, for fair competition, for the needs of consumers and businesses to receive full measure, and for the needs of honest businesses to maintain consumers' confidence in their products, all compel the conclusion that Jones' utilization of the laws in issue was a proper exercise of California's police powers.

### Conclusion

For these reasons, and each of them, the judgments of the court below should be reversed.

Respectfully submitted,

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## APPENDIX A

### **Examples of Adverse Consequences to Commerce, Consumers and Businesses Resulting From Affirmance of the Circuit Court's Holding**

The following are examples of the adverse consequences which will necessarily result if the concept of permitting "reasonable" shortages in every package—authorized by the court below—is permitted to stand.

1. Two supermarkets, A and B, are located across the street from each other. Supermarket A packages its hamburger in its own meat department and the Wholesome Meat Act (WMA) is inapplicable. Supermarket B purchases its meat prepackaged from a wholesaler to whom the WMA does apply.

The State in which the two markets are located has always required true weight to the purchaser. Supermarket A meets this standard and sell its full measure packages for 87¢ per lb. However, because the hamburger sold by supermarket B is subject to the WMA, under the circuit court's decision it need *not* comply with the State law requiring full measure when sold—*i.e.* there can be "reasonable" shortages in every package sold. As a result, supermarket B can sell its "one pound" packages of hamburger for 85¢. B prominently displays and advertises its two cents per pound price "savings." The owner of supermarket A complains to the local weights and measures official that B is defrauding consumers and engaging in unfair competition. The official sympathizes with the honest market-owner but points out that under the Ninth Circuit's decision supermarket B may *advertise* full weight yet sell what are in fact *shortweight* packages at a lesser price.

The honest merchant continues to lose business to his competitor.

2. A grocery chain buys 1,000 boxes of ground meat to be repackaged into retail size packages. Each box bears the United States Department of Agriculture mark "Inspected and Passed" and a label containing the statement "Net Wt. 50 lbs." The boxes, prior to the Ninth Circuit's ruling, contained full measure when delivered to the stores.<sup>1</sup> Now, because of the "reasonable" shortages ruling of the Ninth Circuit, the boxes each contain between 47 and 49 pounds. The grocery chain is nevertheless billed for the full 50,000 pounds.

3. The United States Army buys 2,500 bags of flour, each labeled "50 lbs." In fact they contain between 45 and 49 pounds. When the contracting officer complains to the packer, he is told that the law allows "reasonable" variations, and the packer considers these shortages to be "reasonable." The supply officer contacts the United States Attorney who advises him that if such shortages are regular in the trade, that may be the definition of "reasonable variations," and besides, the government does not want to go to the expense of hiring experts on packaging machinery to try and prove what is "reasonable." The contracting officer pays the invoice and asks for an increased appropria-

<sup>1</sup>The determination of full measure was made by use of a statistically valid lot averaging procedure, whether it be the National Bureau of Standards, Handbook 67 (see brief, *supra*, at 34-35) or a similar procedure such as California's Article 5. Such a procedure enforces the accuracy requirement of the federal or State law by permitting individual boxes of ground meat to vary from stated weight so long as the average weight is the 50 pounds stated on the box. Use of such a statistically valid procedure allows the purchaser to determine the weight of the entire lot by weighing only a few packages, thus saving considerable time (see text at n. 32 *supra*).

tion for food as the shortages are rapidly becoming general.

4. A restaurant operator buys 20 cans of coffee, each labeled "Net Weight 10 lbs." In fact they contain 9½ pounds each. The restaurant owner does not realize that the cans are shortweight but he knows his costs are going up as the coffee just does not go as far as it formerly did. He is forced to raise his prices to pay for the "additional" coffee he must buy.

5. A school district buys 500,000 "half-pints" of milk a week for its school lunch program but the cartons are no longer accurately filled. Dairy farmers supplying the milk for the packages are told by the distributor that less of their milk will be needed hereafter. Their income declines.

6. A shopper in a grocery store compares three brands of canned tuna, all labeled the same weight, but shortfilled by different amounts. The lowest priced brand is packaged in a foreign country and is short filled the most. After continuing to lose sales to their competitor, the two domestic packagers lower their fill standards also. The foreign packer cuts still further to maintain its cost advantage. When the domestic packers complain to their weights and measures official, he tells them he can do nothing because he knows nothing about the packaging machinery in the foreign plant, and even if he did, how can he decide what is a "reasonable" shortage. He sympathizes with their loss of markets (but notes that they are now also short-weighting).

## APPENDIX B

### Affidavit of James W. Robey (Cl. Tr. 304-08)

County of Sacramento, State of California—ss:

#### AFFIDAVIT OF JAMES W. ROBEY

James W. Robey, being first duly sworn, states as follows:

1. I am now and at all times herein mentioned have been the acting program supervisor, quantity control program, Bureau of Weights and Measures, Department of Food and Agriculture, State of California.

2. I have been employed in the quantity control program of the Bureau of Weights and Measures since July 1, 1965.

3. As program supervisor, I am custodian of the package quantity inspection reports submitted by County Sealers of Weights and Measures in California and it is my duty to maintain statistical records relating to quantity inspection of packages.

4. During the first three weeks of July, 1973, I had my staff undertake a survey of the accuracy of flour being sold in California. This was done in response to allegations made in plaintiffs' pleadings and affidavits in this case alleging that shortages from label weight of flour should be permitted because of "reasonable variations caused by gain or loss of moisture during the course of good distribution practice and/or unavoidable deviation in good manufacturing practice."

5. I have read plaintiffs' Notice of Motion for Summary Judgment dated June 29, 1973, arguing that failure to allow for such shortages violates the United States Constitution by depriving the Plaintiffs of due

process of law, and by placing an unreasonable burden on interstate commerce; and arguing further that failure to allow such shortages is in violation of federal and California law.

6. I have also read the affidavits filed in this action in support of plaintiffs' Motion for Summary Judgment by Donald D. Coltitts dated May 14, 1973, Roger C. Miller dated May 2, 1973, and Henry Sumpter, Jr., dated May 2, 1973, all contending and purporting to show that loss of moisture causes shortage in weight of plaintiffs' flour and that it is impracticable, if not impossible, to package flour so as to sell it to consumers accurately labelled as to weight unless all packages are overfilled at enormous expense to plaintiffs to account for sale of some packages in areas of dry humidity.

7. My previous experience led me to question the accuracy of this position and I undertook this survey during July, 1973, to determine the facts under present conditions, using skilled technical personnel and accurate weighing equipment.

8. California is a state of great diversity of climate and humidity, including the dry and hot deserts and moist seaside areas. Plaintiffs' flour is sold in retail stores all over California and if plaintiffs' claims were true, there should be more shortages in the dry, hot areas than the other areas of the State. Because of the seasonal hot weather in July, this was a month most likely to support Plaintiffs' argument, if it were true. Consequently, packages of flour were tested against label weight in retail stores in the inland counties of Fresno, Riverside, San Bernardino, and Sacramento; and the coastal counties of Los Angeles, Santa Barbara, Monterey and San Francisco during the month of July.



9. The statistical results supporting this affidavit are on file in my office. In summary, this study showed the following:

(a) Sixteen per cent of all packages of flour tested were shortweight. In many cases, every package in the lot was shortweight. Plaintiffs' brands were not significantly different from competitor's brands.

(b) There was no correlation between the inland group of counties and the coastal group as to the percentage of shortweight packages.

(c) There was no correlation between the inland group of counties and the coastal group as to the percentage of shortweight in the deficient packages.

(d) In the inland counties, 15.76 per cent of all packages were shortweight while in the coastal counties, 16.57 per cent of all packages were shortweight. Shortages in individual packages ranged from a portion of 1 per cent to 14 per cent.

10. The inspectors making the test could make no determination in any case as to why any of the packages was shortweight. The reasons for shortweight packages could have been the following:

(a) The manufacturer intentionally set his machinery so that it would place into the containers less flour than the stated quantity.

(b) The manufacturer negligently maintained his machinery, or his scales, or both, so that the correct amount of flour was not placed into the packages.

(c) The original amount of flour placed in the packages was only sufficient to allow it to be accurately labelled at the time it left the plant, while the manufacturer knew that some evaporation of mois-

ture would take place and that the packages necessarily would be shortweight when sold to consumers.

(d) Any combination of the factors had occurred.

11. From the results of this study, and from my experience as a weights and measures official, I draw these conclusions:

(a) It is not true that the loss and gain of moisture in flour presents plaintiffs with a special problem based on the area of sale of their flour.

(b) It is not true that plaintiffs are faced with any special problem resulting from "reasonable variations caused by gain or loss of moisture during the course of good distribution practice and/or by unavoidable deviations in good manufacturing practice." All of these deviations can reasonably be controlled so as to provide wholesalers, retailers and consumers with accurately labelled packages, as is true in the case of the packaging of other hygroscopic products. Flour is not unique. The same problems are found in packaging bakery products, rice products, meat and poultry products, fish products, and dairy products.

(c) Plaintiffs can, if they wish to, package their flour so as to be accurately labelled at the time of sale to wholesale and retail customers.

12. The continuing problem of shortweight flour requires excessive attention by weights and measures officials. If plaintiffs are allowed to continue to sell shortweight flour, this will impair the integrity of the weights and measures system upon which competing manufacturers, wholesalers and retailers must rely for a common standard; and in addition permit knowing and continuing misrepresentation to consumers. Plain-

tiffs weight label their products expecting purchasers to rely on that representation of weight at time of retail sale. The integrity of government is placed in jeopardy when weights and measures officials are asked to place a meaning on that representation which authorize shortweight and thereby authorize the deception of consumers.

The above stated matters are within my personal knowledge and if I am called and sworn as a witness, I can testify competently thereto.

Executed on this 1st day of August, 1973, at Sacramento, California.

/s/ James W. Robey  
James W. Robey

Subscribed and sworn to before me this 1st day of August, 1973.

/s/ Barbara E. Russell  
BARBARA E. RUSSELL  
Notary Public in and for the County  
of Sacramento, State of California

[Seal]

## APPENDIX C

### Statutes, Regulations and Legislative Materials

'The Federal Insecticide, Fungicide, and Rodenticide Act, 61 Stat. 163, as amended by 78 Stat. 190, 193, 7 U.S.C. section 135(a) provides:<sup>2</sup>

It shall be unlawful for any person to distribute, sell, or offer for sale in any Territory or in the District of Columbia, or to ship or deliver for shipment from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, or to receive in any State, Territory, or the District of Columbia from any other State, Territory or the District of Columbia, or foreign country, and having so received, deliver or offer to deliver in the original unbroken package to any other person, any of the following:

(2) Any economic poison unless it is in the registrant's or the manufacturer's unbroken immediate container, and there is affixed to such container, and to the outside container or wrapper of the retail package, if there be one through which the required information on the immediate container cannot be clearly read, a label bearing—

(c) *the net weight or measure of the content: Provided, That the Administrator may permit reasonable variations.* . . . (Emphasis added.)

<sup>2</sup>This statute was amended to transfer responsibility for its enforcement to the Administrator, Environmental Protection Agency, by 84 Stat. 2086. No substantive change was made to 7 U.S.C. § 135(a)(2)(c).



The United States Department of Agriculture issued an interpretation of this statute which has been adopted as a regulation by the Environmental Protection Agency, the agency now charged with its enforcement.

This regulation, 40 C.F.R. §162.104, provides:

*Interpretation with respect to statement of net contents.*

(d) *Permissible variations.* (1) If the contents are stated as a minimum quantity, the package must contain at least the quantity claimed. No variation below this quantity is permitted and any variation above the contents stated must not be unreasonably large.

(2) The net content is considered to be the average net content unless stated as a minimum quantity. Where average net content is used:

(i) The average content of the packages in any shipment must not fall below the quantity stated and variation above the quantity stated is permitted only to the extent that it represents deviations unavoidable in good packing practice.

(ii) There must be no unreasonable variation from the average in the content of any package.

(e) *Allowance for loss.* A statement of net content "when packed" does not comply with the requirements of the act. The statement must be such that it will be correct as long as the economic poison is subject to the law. Thus, if a product such as borax may lose weight by drying out when stored in paper bags, it must be packed and labeled in such a way that the statement of net content will be correct when the product is purchased. (Emphasis added.)

Senate Report No. 1186 (89th Cong. 2d Sess.) reprinted in 3 1966 U.S. Code Cong. and Admin. News 4069 at 4071 states:

....

The Senate Commerce Committee held 10 days of hearings on S. 985, and had before it five volumes of testimony taken in 1961, 1962, 1963, and 1964 by the Antitrust and Monopoly Subcommittee, on packaging and labeling practices in the marketing of consumer commodities.

Out of all these hearings there has emerged a pattern of marketing practices which the committee believes have substantially impaired the fair and efficient functioning of consumer commodity marketing. In particular, the hearings identified certain undesirable conditions and practices to which this legislation is principally directed. They include—

(1) *Confusing, inconspicuous, incomplete or nonexistent quantity of contents statements on labels;*

(2) Lack of uniformity in the designation of units of weight or fluid volume. Thus, a package may be labeled "1 qt. 1 oz." or "33 oz."; 1 pint," "16 ounces" or "1 half-quart";

(3) The use of qualifying adjectives to exaggerate the quantity of contents, such as "giant" or "jumbo" quart;

(4) The use of size characterizations, such as "small," "medium," and "large," and "servings" designations, without meaningful standards of reference;

(5) The imprinting on the package by the manufacturer of purported price information imply-



ing retail bargains such as "cents off" or "economy size" representations. In placing such representations on his package, the manufacturer is promising the consumer a price advantage which he cannot fulfill, for it is the retailer and not the manufacturer who determines the price which the consumer pays;

(6) Insufficient or nonexistent ingredient information, such as the failure to disclose the percentages of costly and inexpensive ingredients or active and inert ingredients; and

(7) The proliferation of awkward and fractional weights and quantities, in which many consumer commodities are being marketed. For example, potato chips have recently been marketed in 71 different quantities under 3½ pounds. And instant coffee is presently being sold in 2 oz., 2½ oz., 4 oz., 5 oz., 6 oz., 7 oz., 8 oz., 9 oz., 10 oz., etc., jars. The consumer is thus compelled to divide the retail price by the number of ounces in each package to arrive at the unit costs by which the packages can be compared.

Testimony before the committee established that present law is inadequate or imprecise to a degree that permits these practices and conditions to flourish unabated. . . . (Emphasis added.)

§ 402 of the WMA, 21 U.S.C. § 672, provides:

Whenever any carcass, part of a carcass, meat or meat food product of cattle, sheep, swine, goats, horses, mules, or other equines, or any product exempted from the definition of a meat food product, or any dead, dying, disabled, or diseased cattle, sheep, swine, goat, or equine is found by any authorized representative

of the Secretary upon any premises where it is held for purposes of, or during or after distribution in, commerce or otherwise subject to subchapter I or II of this chapter, and there is reason to believe that any such article is adulterated or misbranded and is capable of use as human food, or that it has not been inspected, in violation of the provisions of subchapter I of this chapter or of any other Federal law or the laws of any State or Territory, or the District of Columbia, or that such article or animal has been or is intended to be, distributed in violation of any such provisions, it may be detained by such representative for a period not to exceed twenty days, pending action under section 673 of this title or notification of any Federal, State, or other governmental authorities having jurisdiction over such article or animal, and shall not be moved by any person, firm, or corporation from the place at which it is located when so detained, until released by such representative.

...

Calif. Bus. and Prof. Code § 12211, as in force during Jones' inspection of respondents' products, provided:<sup>a</sup>

Each sealer shall, from time to time, weigh or measure packages, containers or amounts of commodities sold, or in the process of delivery, in order to determine whether the same contain the quantity or amount represented and whether they are being sold in accordance with law.

The director is hereby authorized and directed to adopt and promulgate necessary rules and regulations

<sup>a</sup>§ 12211 was amended in 1973 in a manner not relevant to these proceedings.

governing the procedures to be followed by sealers in connection with the weighing or measuring of amounts of commodities in individual packages or containers or lots of such packages or containers, including the procedures for sampling any such lot, and in determining whether any package or container or a lot of such packages or containers complies with the provisions of this section.

Any such rule or regulation, or amendment thereof, shall be adopted and promulgated by the director in conformity with the provisions of Chapter 4.5 (commencing with Section 11371), of Part 1 of Division 3 of Title 2 of the Government Code; provided, that the average weight or measure of the packages or containers in a lot of any such commodity sampled shall not be less, at the time of sale or offer for sale, than the net weight or measure stated upon the package, and provided further, that said rules or regulations applicable to food, as defined in Section 26450 of the Health and Safety Code, insofar as possible, shall not require higher standards and shall not be more restrictive than regulations, if any, promulgated by the Department of Health, Education, and Welfare, Food and Drug Administration, under the provisions of the Federal Food, Drug and Cosmetic Act.

Any lot or package of any such commodity which conforms to the provisions of this section shall be deemed to be in conformity with the provisions of this division relating to stated net weights or measures.

Whenever a lot or package of any commodity is found to contain, through the procedures authorized herein, a less amount than that represented, the sealer shall in writing order same off sale and require

that an accurate statement of quantity be placed on each such package or container before same may be released for sale by the sealer in writing. The sealer may seize as evidence any package or container which is found to contain a less amount than that represented.

Congressional Debates on Enactment of the Wholesome Meat Act:

There is nothing in the Legislative debates on the WMA to indicate that the members of Congress thought that the bill would affect the long established right of the States to regulate with regard to meat products offered for sale to our consumers. A good indication of the congressional view of the respective roles of State and federal governments is found in the comments of Congressman Pirnie, at page 30527 of 113 Congressional Record (1967):

"An editorial in this morning's Washington Post stated clearly what I believe is the mission before us. In referring to the type of legislation needed, the editorial said:

'In our view, there are two major objectives to be sought: (1) The elimination of every pound of unclean or unwholesome meat from the market; (2) Accomplishment of this objective within the framework of our federal system, which often calls for federal aid to help the states perform their local functions instead of mere absorption of those functions by an overextended federal bureaucracy.'

My own state of New York has a meaningful meat inspection program, and has had it for some time; however, there are several states without such a program. In these states, the consumer has no guarantee whatsoever that any meat products processed, packed, and distributed solely within the borders of a state



are wholesome and meet certain minimum health and quality requirements. This meat is not subject to federal inspection because it is not involved in interstate commerce.

The solution to the problem, in my view, is not for the federal government to take over all meat inspection, permitting the states to abandon their responsibilities in this area. Nor should we turn our backs to the matter and let the states fend for themselves. The answer lies somewhere in the middle.

As the committee suggests, let us establish a federal-state partnership. We hear so frequently the term 'creative federalism', let us test its practicality in this regard. By working with the states and agreeing to share the cost and assist in the development of programs on the local level—programs with teeth in them—we will at once make significant progress toward the eventual attainment of the worthy goals outlined in the Post editorial."

Other indicative comments include those of Congressman Latta of Ohio, at page 30509 of 113 Congressional Record (1967):

"The proposed legislation would enhance the state by providing for federal cooperation with appropriate state agencies in developing and administering state meat inspection programs."

At page 30516 of 113 Congressional Record (1967), Congressman Mayne of Iowa remarks:

"The bill . . . is a good bill which will do much to improve meat inspection throughout the United States. Moreover, it will permit state and local governments to perform a necessary role in this important function which is so vital to the health of our country.

I believe there is a proper role for the state governments and local governments under our federal system and that inspection of meat is a function which properly falls within their jurisdiction."

Though the exchange occurred during the discussion of the Conference Committee report, which dealt largely with the proper role of federal inspection of intrastate processing, the discussion between Congressman Gerald Ford of Michigan (now President) and Representative Page Belcher of Oklahoma contains interesting language. At page 35151 of 113 Congressional Record (1967), the following colloquy occurs:

*Mr. Gerald R. Ford.* Within the past year, in my part of the state of Michigan, we have had a number of serious meat scandals, even under good state legislation. Those accused were prosecuted, both individuals and corporations. Under the state law, a number of convictions were achieved.

I believe we have an excellent state law. As I indicated, when violations of law did occur, convictions were obtained.

Under the conference report, can the State of Michigan continue its program and can it qualify for fifty-percent funding by the federal government?

*Mr. Belcher.* The fact of the matter is that we invite the state of Michigan and the states of Texas, Oklahoma, Kansas, or Nebraska to do the same thing that Michigan did, and the federal government will pay half of the bill.

I hope—and I believe all the conferees hope—every state will take over the responsibility, together with the federal government, of protecting the people. . . .



President Ford, at least, was led to believe that the State of Michigan could continue its meat inspection program, both of intrastate and interstate meats.

Indeed, the entire Congress was led to believe that the WMA did not intend a revolution in weights and measures enforcement. There is no debate on § 408 itself—had a major change been intended there would have been—and as the above quotations indicate, the Congress clearly intended that the States were to continue their vital role in assuring sale of wholesome (as well as accurately labeled) meat products.<sup>4</sup>

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<sup>4</sup>Adapted from the Brief of the States of Michigan, Arkansas, Oklahoma, Oregon, Texas and West Virginia as Amici Curiae in Support of Petitioners in No. 75-1052.

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1975

No. 75-1053

JOSEPH W. JONES, as Director of the County of Riverside,  
California, Department of Weights and Measures,  
*Petitioner,*

v.

THE RATH PACKING COMPANY, a corporation,  
*Respondent.*

JOSEPH W. JONES, as Director of the County of Riverside,  
California, Department of Weights and Measures,  
*Petitioner,*

v.

GENERAL MILLS, INC., a corporation; THE PILLSBURY COMPANY, a  
corporation; SEABOARD ALLIED MILLING CORPORATION, a corporation,  
*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT

**BRIEF OF THE STATE OF NEW YORK AS AMICUS  
CURIAE IN SUPPORT OF PETITIONER**

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Wholesome Meat Act of 1967, 21 U.S.C. §§ 601 <i>et seq.</i> .....	<i>Passim</i>

## OTHER AUTHORITIES

"Handbook 67", Checking Prepackaged Commodities, National Bureau of Standards, U.S. Department of Commerce, 1959 .....	<i>Passim</i>
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IN THE  
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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT

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**BRIEF OF THE STATE OF NEW YORK AS AMICUS  
CURIAE IN SUPPORT OF PETITIONER**

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**Jurisdictional Statement**

This brief is submitted on behalf of the State of New York, *amicus curiae*, pursuant to Rules 42(1) and (4) of this Court.

### Opinions Below

The cases on appeal herein are officially reported as *Rath Packing Company v. Becker*, 530 F.2d 1295 (9th Cir. 1975) and *General Mills, Inc. v. Jones*, 530 F.2d 1317 (9th Cir. 1975).

### Interest of Amicus State of New York

This *amicus curiae* brief is submitted by the State of New York in support of reversal of the orders of the Court of Appeals for the Ninth Circuit holding petitioner's weights and measures enforcement procedures concerning net contents labeling of meats and flour preempted, respectively, by the Wholesome Meat Act of 1967 ("WMA"), 21 U.S.C. §§ 601 *et seq.* and the Fair Packaging and Labeling Act ("FPLA"), 15 U.S.C. §§ 1451 *et seq.*, and the Food, Drug and Cosmetic Act ("FDCA"), 21 U.S.C. §§ 301 *et seq.*

The general background and details concerning these appeals have been presented to this Court in the petitioner's brief. This *amicus* brief is concerned primarily with the decisions of the Court of Appeals as they may affect other states and municipalities including the State of New York and its county and city weights and measures enforcement procedures. New York's net contents labeling requirements, modeled on "Handbook 67" (Checking Prepackaged Commodities, National Bureau of Standards, U.S. Department of Commerce, 1959) are annexed as Appendix "A" to this brief.

As petitioner and others have noted, enforcement of weights and measures regulations remains the primary responsibility of state and municipal authorities, notwithstanding the enactment of federal legislation designed to provide uniform standards. Without denigrating the role of the federal government in this area, it must be empha-

sized that the practical problems involved with enforcement of net contents labeling laws are resolved daily by state and local agencies, with due regard for the rights of both consumers and packers. As petitioner notes, this primary responsibility of the states has been recognized in countless decisions upholding local regulation in the face of preemption attacks. New York endorses the briefs submitted on these appeals by other *amici* and petitioner herein.

The key to these appeals is Handbook 67, published since 1959 by the U.S. Department of Commerce for use by state and municipal weights and measures officials in promoting national uniformity in the inspection of prepackaged commodities for accuracy in net contents labeling.\* This booklet was developed after considerable consultation with enforcement officials as well as sellers and manufacturers of prepackaged commodities. With the concurrence of both consumers and packers, Handbook 67 is in wide use throughout the nation, and provides the basis for the enforcement procedures contested herein as well as those used in New York.

California's contested regulations provide a statistical method for testing the compliance of packers with the State's accuracy requirements for net contents labeling. The statistical methodology is explained in detail in the Ninth Circuit's *Rath* opinion, 530 F.2d 1295, 1299-1300 (9th Cir. 1975) (cf. Handbook 67, pp. 13-24). Essentially, the state or local inspection official selects a certain number of valid samples from a shipment or lot of the commodity to be tested, ascertains the *average* net weight of the samples, and compares this average weight with the net contents of the commodity as labeled.

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\* Handbook 67 is annexed as an appendix to the Brief of California *Amicus Curiae* in support of the petition for certiorari herein.

The California regulations do not explicitly provide for reasonable variations between this average weight and the weight as labeled, whether caused by loss or gain of moisture during distribution or unavoidable deviations as a result of the limits of manufacturing practices.

In contrast, the regulations promulgated pursuant to the WMA (21 U.S.C. § 601[n][5]) and the FDCA (21 U.S.C. § 343) provide that reasonable variations from the net contents stated on commodity labels may be permitted when caused by loss or gain of moisture during distribution or unavoidable deviations during packing.

This conflict frames the issues before the Court. Initially, the Court must decide whether the promulgated federal regulations\* are unduly vague and in excess of the jurisdiction conferred upon the responsible federal officials pursuant to the WMA and the FDCA. If these regulations are found to be valid, this Court must determine whether the contested California regulations are preempted by the WMA, the FDCA or the FPLA. In view of the central importance of Handbook 67 to California's regulations and the interests of countless state and local jurisdictions, this Court should resolve the issues presented to it in the context of the effects of the decisions herein upon the vitality of Handbook 67 and its use by state and local officials across the nation.

### Summary of Argument

I. In considering whether the regulations promulgated pursuant to the FDCA and the WMA, which permit reasonable variations from the accuracy in net contents labeling requirements of those statutes, are void for vagueness, this Court should examine the federal regulations in the context of the intent of the FDCA and the WMA to permit con-

\* 21 CFR § 1.8b(q); 9 CFR 317.2(h)(2).

tinued state and local enforcement of their net contents labeling laws. The federal regulations, by establishing an indeterminate "reasonable variation" standard, provide no guidelines for state and local agency compliance with federal law, and should be found void for vagueness.

II. Assuming the federal regulations permitting reasonable variations are found valid, state and local net contents labeling laws which permit reasonable variations in the discretion of state and local agencies should be found consistent with the federal regulations. Handbook 67, prepared for state and local use by the U.S. Department of Commerce, allows for reasonable variations caused by gain or loss of moisture during distribution or by deviations during manufacturing, and therefore is consistent with the WMA and FDCA, and hence the FPLA.

### I

**The federal net contents labeling regulations promulgated pursuant to the WMA and the FDCA are unduly vague and inconsistent with the intent of those acts to permit state and local enforcement of net contents labeling requirements consistent with the federal acts.**

Both the WMA and the FDCA provide, in nearly identical terms, for net weight labeling of packages. (21 U.S.C. § 601[n][5]; 21 U.S.C. 343 [e]). The two statutes require "accurate" labeling of the quantity of the package contents; both provide that "reasonable variations may be permitted . . . by regulations prescribed by the Secretary."

Pursuant to these statutes, the Secretaries of Agriculture and Health, Education and Welfare promulgated implementing regulations. The reasonable variations to be permitted net weight labeling of meat and meat food products are established in 9 CFR 317.2(h)(2). Consumer



commodities regulated under the FDCA are allowed reasonable variations in their net weight statements pursuant to 21 C.F.R. § 1.8b(q). Both of these regulations provide that

“[r]easonable variations caused by loss or gain of moisture during the course of good distribution practice or by unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large.”

These regulations do not prescribe the variations that are permitted, as required by the respective statutes. Rather, merely repeating the general legislative guideline as to reasonableness, these regulations identify *causes* which may give rise to variations which can be considered “reasonable”, specifying that these variations “shall not be unreasonably large.”

By itself, this directive, applied by federal inspectors in the field, would not appear to be arbitrary and unduly vague. Situations vary on a case by case basis, and latitude must be allowed those charged with enforcement of the Acts. The use of the term “reasonable” has, as the court below noted, withstood charges of vagueness.

However, read in the context of the WMA and the FDCA, and considering the consequences of such regulations as they affect federal/state relationships, the subjectivity of these regulations places California, New York, and other states and localities on the horns of a dilemma. It is the contention of *amicus* that the federal regulations, examined in light of the cooperative intent of the two Acts, are unduly vague.

The FDCA contains no preemption language. It has been widely acknowledged, and the court below recognized that weights and measures regulations enforced by states and their local authorities were not to be preempted by that Act, unless there were direct conflicts which could not be reconciled.

“When the prohibition of state action is not specific but inferable from the scope and purpose of the federal legislation, it must be clear that the federal provisions are inconsistent with those of the state to justify the thwarting of state regulation.”

*Cloverleaf v. Patterson*, 315 U.S. 148, 156. See *Texas & Pacific Ry. Co. v. Abilene Cotton Co.*, 204 U.S. 426, 437; *Kelly v. Washington*, 302 U.S. 1, 10; *Savage v. Jones*, 225 U.S. 501, 533; *New York Department of Social Services v. Dublino*, 413 U.S. 405.

Similarly, while the WMA contains express preemption language, providing that states cannot impose any labeling requirements “in addition to, or different than” those established under the WMA, the Act also provides that any state “may, consistent with the requirements under this chapter, exercise concurrent jurisdiction with the Secretary.” 21 U.S.C. § 678.

Thus, both the FDCA and the WMA recognize that states and localities may enforce weights and measures labeling requirements not in conflict with the FDCA requirements and not different than or in addition to the WMA requirements.

In order to enforce state and local laws within these strictures, however, states and localities must be able to interpret and apply the federal laws and regulations. The states and localities have attempted to do this through the federally-prepared Handbook 67, which prescribes a statistical averaging method designed to permit reasonable variations.

The Ninth Circuit, however, apparently struck down the use of this federal handbook in *General Mills*, 530 F.2d 1317, 1326-1327 (9th Cir. 1975):

“We recognize that step 10 of the California procedure as described in the *Rath* opinion takes variations of individual packages from accurate weight into account in determining whether lots should be

ordered off sale; but these variations are evaluated solely on a statistical basis, and may be greater than, as well as less than, the reasonable variations permitted each package by 21 CFR 1.8b(q) and may arise from circumstances not recognized by the federal regulation."

How, one may ask, are states and localities to adopt procedures in compliance with federal law, when the federal regulations leave determinations of reasonableness solely in the discretion of federal inspectors? The court below was correct in noting that the "reasonable variations" permitted by California might be different than or in conflict with the reasonable variations permitted under federal law. But the court failed to come to grips with the fact that the very vagueness of the federal regulations makes it impossible for states and localities to permit reasonable variations which are the same as or consistent with the federal regulations.

Thus it may be said that the WMA and the FDCA, in directing the respective Secretaries to permit reasonable variations, contemplated that the regulations promulgated would be capable of objective application sufficient to permit continuing state and local enforcement of weights and measures labeling laws. By promulgating regulations identifying the permissible *causes* of reasonable variations, without setting forth any objective standards to measure the reasonableness of permitted variations, the Secretaries have, if the Ninth Circuit decision is upheld, effectively frustrated state and local regulation in an area long under local jurisdiction, and whose continued enforcement activities were contemplated by the WMA and the FDCA themselves.

It is not without significance that enforcement of weights and measures labeling requirements is in fact carried out in the main not by the federal government, but by the

state and local jurisdictions that have long performed this function, based on the uniform national guidelines fostered by Handbook 67.

Ironically, it must be noted that Handbook 67, produced under the auspices of the federal government for state and local use, contains an objective methodology for permitting reasonable variations precisely along the lines presumably contemplated by Congress when it authorized the responsible federal agencies to prescribe regulations permitting reasonable variations.

In establishing objective "unreasonable minus or plus errors" for the determination of the "reasonableness" of errors in individual packages, Handbook 67 makes explicit allowance for variations caused by gain or loss of moisture:

"It will be noted that the suggested plus allowances are twice the suggested minus allowances at each labeled quantity. This is an acknowledgment that packers must be allowed to overfill such packages as are susceptible of moisture loss." *Handbook 67*, p. 15.

The improper vagueness of the WMA and FDCA regulations becomes evident when one considers their practical effect on enforcement, whether it be state and local or federal in nature. Testing for enforcement purposes must be undertaken at or near the place of sale. This is implicit in allowing variations based on good *distribution* practices. Yet when an inspector discovers variations, how is he or she to determine whether they were caused by gain or loss of moisture, or by some other factor? In order to arrive at this subjective determination, an inspector would have to know how long the product was in the distribution pipeline, where it was manufactured, whether it was part of a large regional shipment or whether it was part of a shipment directed to an area where moisture loss should have been anticipated, and numerous other facts.



The practical effect of the vague FDCA and WMA regulations is to institutionalize variations, for enforcement officials cannot possibly devote the time and resources necessary to justify subjective determinations of unreasonableness, as noted above.

In contrast, Handbook 67 provides enforcement officials with a practical and fair enforcement tool which has been approved by consumers and manufacturers alike. Under this booklet, manufacturers are expected to anticipate moisture losses and gains, and to package their products accordingly. Certainly, experience in distribution should enable manufacturers to make informed judgments and to pack accordingly. Handbook 67 recognizes the limits of packers' predictive abilities, without granting them the *carte blanche* exception inherent in the federal regulations.

As to the Ninth Circuit's belief that Congress, by acquiescing in the regulations promulgated pursuant to the WMA and the FDCA, can be considered to have approved them, it should be noted that this acquiescence occurred in the context of comprehensive state and local enforcement of weights and measures labeling laws, and continued appropriations for the publication of Handbook 67 by the U.S. Department of Commerce.

## II

**Handbook 67 as used by petitioner prescribes procedures for enforcing accuracy in net contents labeling which are not different than or in conflict with the WMA or the FDCA.**

Assuming, *arguendo*, the validity of the regulations promulgated pursuant to the provisos of the FDCA and WMA accuracy in labeling requirements, Handbook 67 prescribes enforcement procedures which are not in conflict with or different than the federal regulations.

Those regulations require labels which accurately state the net contents of packages subject to the respective statutes, providing for reasonable variations based on gain or loss of moisture during good distribution practice and unavoidable deviations in good manufacturing practice.

As noted previously, reasonable variations caused by gain or loss of moisture are recognized in the Handbook by allowing a greater margin of error in individual packages due to overfilling. The Handbook rejects the notion that packages accurately labeled when packed may be approved upon inspection at the point of sale, though underweight, when the discrepancy is due to loss of moisture. Instead, objective allowances for variations on this ground are made, but packers who do not overpack in anticipation of moisture loss will not have their non-compliance excused merely because it was caused by moisture loss. This approach gives true meaning to the word "reasonable" in the "reasonable variations" terminology employed by the federal regulations. I.e., it is not reasonable for packers not to anticipate a certain amount of moisture loss.

This realistic view, maximizing the protection of the consumer which Congress intended, is endorsed in both the WMA and the FDCA. With respect to the WMA, see 9 CFR § 317.2(h)(8) and 16 CFR § 500.6, which prohibit the use of the phrase "net weight when packed." With respect to the FDCA, see 21 CFR 1.8b(o), which prohibits the use of qualifying phrases as to quantity, as does § 1453(b) of the FPLA. Clearly, in authorizing reasonable variations, Congress did not intend to absolve packers of any responsibility for labeling inaccuracies based on weight losses during distribution, merely because a product was accurately labeled as to net contents when packed.

Similarly, Handbook 67 permits reasonable variations caused by "unavoidable deviations in good manufacturing practice." Such variations are based on recognition of the limits of large scale packaging and weighing procedures.



The statistical or averaging method of measuring compliance under the Handbook has built into it an allowance for such unavoidable deviations.

"Perfection in either mechanical devices or human beings has not yet been attained; thus the existence of imperfection must be recognized and allowances for such imperfection must be made. These allowances are recognized in the 'average concept.'" *Handbook 67*, p. 5.

Put simply, by testing the accuracy of the net contents labeling of packages in a given lot against the *average* weight of the packages, the statistical method factors out those unavoidable deviations that occur from package to package because of the limits of packaging practices.

In answer to the suggestion that variations considered reasonable by state and local authorities might be inconsistent with or different from variations considered reasonable by the federal authorities, and hence preempted, this Catch-22 logic, as noted previously, would frustrate the federal/state cooperation explicitly recognized by the FDCA and the WMA. Rather, the "reasonable variations" standard promulgated pursuant to the FDCA and the WMA, if valid, must be considered broad enough to permit state and local enforcement subject to any reasonable variations employed by these enforcement authorities. To hold otherwise would be to permit federal regulations in an area acknowledged to be of primary state and local concern to be preempted simply because the federal regulations are too vague to allow for their enforcement by state and local authorities.

## CONCLUSION

**The orders of the court below should be reversed.**

Dated: New York, N.Y., June 16, 1976.

Respectfully submitted,

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## Appendix "A".

## STATE OF NEW YORK

## DEPARTMENT OF AGRICULTURE AND MARKETS

[Emblem]

## WEIGHTS AND MEASURES MANUAL

(Rules and regulations promulgated pursuant to Section 196-a of the Agriculture and Markets Law.)

CIRCULAR 905

April, 1974

• • •

221.8 *Variations to be allowed.* (a) *Variations from declared net quantity.* Variations from the declared net weight, measure or count shall be permitted when caused by unavoidable deviations in weighing, measuring, or counting the contents of individual packages that occur in good packaging practice, but such variations shall not be permitted to such extent that the average of the quantities in the packages of a particular commodity comprising either a shipment or other delivery of the commodity or a lot of the commodity that is kept, offered, or exposed for sale, or sold, is below the quantity stated, and no unreasonable shortage in any package shall be permitted, even though overages in other packages in the same shipment, delivery, or lot compensate for such shortage. Variations above the declared quantity shall not be unreasonably large.

(b) *Variations resulting from exposure.* Variations from the declared weight or measure shall be permitted when caused by ordinary and customary exposure to con-

## Appendix "A".

ditions that normally occur in good distribution practice and that unavoidably result in change of weight or measure, but only after the commodity is introduced into intrastate commerce. *Provided*, that the phrase "introduced into intrastate commerce" as used in this paragraph shall be construed to define the time and the place at which the first sale and delivery of a package is made within the State, the delivery being either

(1) directly to the purchaser or to his agent, or

(2) to a common carrier for shipment to the purchaser, and this paragraph shall be construed as requiring that, so long as a shipment, delivery, or lot of packages of a particular commodity remains in the possession or under the control of the packager or the person who introduces the package into intrastate commerce, exposure variations shall not be permitted.

**No. 75-1053**

Supreme Court, U. S.

**FILED**

**JUL 14 1976**

**MICHAEL RODAK, JR., CLERK**

**In the  
Supreme Court of the United States**

**OCTOBER TERM, 1975**

**JOSEPH W. JONES, as Director of the County of Riverside,  
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**THE RATH PACKING COMPANY, a corporation, et al.,**  
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals  
for the Ninth Circuit**

**BRIEF FOR THE AMERICAN MEAT INSTITUTE  
AS AMICUS CURIAE**

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**In the  
Supreme Court of the United States**

OCTOBER TERM, 1975

**No. 75-1053**

**JOSEPH W. JONES**, as Director of the County of Riverside,  
California, Department of Weights and Measures,  
*Petitioner,*

vs.

**THE RATH PACKING COMPANY**, a corporation, et al.,  
*Respondents.*

On Writ of Certiorari to the United States Court of Appeals  
for the Ninth Circuit

**BRIEF FOR THE AMERICAN MEAT INSTITUTE  
AS AMICUS CURIAE**

**INTEREST OF THE AMICUS CURIAE**

Amicus Curiae. The American Meat Institute (the "Institute") is a national trade association of the meat industry. Included in its more than 300 members are meat packers of varying size who process, package and otherwise prepare meat and meat food products at federally-inspected establishments pursuant to the federal Wholesome Meat Act of 1967, 21 U.S.C. §§ 601-695. These meat



products, in turn, are offered for resale throughout the United States, and, thus, may be subject not only to the California net weight labeling requirements being challenged in this case, but to a variety of differing regulations which may be adopted and enforced by other states, if the California regulations at issue are not deemed to be preempted in accordance with the expressed intention of the United States Congress.

Because the decision reached by this Court will not only govern the right of the State of California to regulate net weight labeling of meat products prepared throughout the country, but is also likely to affect similar activity in other states, the entire meat packing industry has a direct interest in the outcome of this litigation. In view of the detrimental impact which state regulation of labeling would have upon meat packers who are not parties to this litigation, the Institute respectfully requests this Court to consider its position as stated herein.

This brief is filed with the written consent of all parties pursuant to Rule 42(2) of this Court.

### SUMMARY OF ARGUMENT

In Section 408 of the Wholesome Meat Act, Congress has unmistakably manifested its intent to preclude state regulation of net weight labeling of meat and meat food products. While Congress has permitted the states to assist in the enforcement of federal net weight labeling standards, it is the federal statute and regulations promulgated thereunder which declare what meat and meat food products are misbranded and thus subject to state enforcement procedures. The state regulations at issue here differ from the federal requirements in that they do not provide for reasonable variation in net weight attribut-

able to loss of moisture content during distribution and do not consider absorption into the wrapper when measuring gross package weight. Under these circumstances, petitioner's regulation of net weight labeling directly contravenes the expressed preemptive intent of Congress, and must be invalidated under the Supremacy Clause of the United States Constitution.

There is little need to resort to legislative history in view of the unambiguous preemptive language of the Wholesome Meat Act. Nonetheless, it is noteworthy that the legislative history of that Act, and associated enactments, overwhelmingly supports the conclusion that Congress intended to preempt state regulation of net weight labeling. Not only does the legislative commentary issued contemporaneously with enactment of the preemptive language of the Wholesome Meat Act dictate this result, but such conclusion is rendered inescapable by the unsuccessful efforts made in 1973 to amend the language at issue after the United States Court of Appeals for the Sixth Circuit had interpreted congressional intent to preclude all state regulation in *Armour v. Ball*, 468 F.2d 76 (6th Cir., 1972), *cert. denied*, 411 U.S. 981 (1973).

The congressional intent to promote a uniform national regulatory scheme for net weight labeling of meat and meat food products would be defeated if the states were each permitted to impose individual regulatory standards. Moreover, apart from potential differences in measurement techniques among the states, it must be recognized, as petitioner has failed to do, that there are other factors to be considered when developing fair, uniform requirements for an industry operating on a nationwide basis. Unless deviations in moisture content are taken into account, as required by the Secretary of Agriculture, meat packers would be subjected to unreasonable burdens in-

herent in tailoring the gross weight of each product for different geographical markets depending upon the length of distribution time, relative humidity, average shelf time, consumer buying habits and similar factors.

In view of the unequivocal preemptive language adopted by Congress, the supporting legislative history, and the needs of the meat packing industry for a uniform national regulatory scheme, the judgment of the Court of Appeals invalidating petitioner's efforts to regulate net weight labeling of meat products should be affirmed.

## **ARGUMENT**

At its core, this case raises a remarkably uncomplicated issue—whether the United States Congress has ordained in Section 408 of the Wholesome Meat Act of 1967, 21 U.S.C. § 678, that the states may not impose net weight labeling standards on meat and meat food products which differ from those set forth in that Act. Reducing that general inquiry to more specific language, the question presented is whether the petitioner, by regulating net weight labeling pursuant to Section 12211 of the California Business and Professions Code and Title 4, Chapter 8(2), Article 5 of the California Administrative Code, in a manner which differs from the regulatory scheme established in Section 1(n)(5) of the Wholesome Meat Act, 21 U.S.C. § 601(n)(5), and in federal regulations promulgated thereunder, 9 C.F.R. § 317.2(h)(2), has violated the intent of Congress to exclusively occupy that field of regulation.

Whether the question is stated in the broad form, or in a more direct fashion, an affirmative answer is dictated by (i) the unequivocal preemptive language adopted by Congress, (ii) the legislative history supporting that language, and (iii) the practical need for uniformity in regulations which underlay the legislative decision to preempt.

### **I.**

#### **THE CALIFORNIA REGULATORY SCHEME DIRECTLY CONTRAVENES THE EXPRESS INTENT OF CONGRESS TO PREEMPT STATE REGULATION OF NET WEIGHT LABELING OF MEAT AND MEAT FOOD PRODUCTS.**

As this Court has repeatedly recognized, Congress has the power under the Supremacy Clause of the United

States Constitution\* to vest a federal agency with exclusive jurisdiction to regulate a field of commerce and to preclude all state activity in that area. To accomplish this end, Congress need only express its clear intent to do so. Federal regulation of a field of commerce will be deemed preemptive of state regulatory power where "Congress has unmistakably so ordained." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963). As this Court stated in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947):

"Congress may, if it chooses, take unto itself all regulatory authority . . . share the task with the States, or adopt as federal policy the state scheme of regulation . . . *The question in each case is what the purpose of Congress was.*" (Emphasis supplied.)

Thus, this Court is called upon to determine whether Congress, through enactment of the Wholesome Meat Act, manifested its intent to preclude state regulation of net weight labeling of meat products.

Section 408 of the Wholesome Meat Act provides an unmistakable statement of congressional intent by specifically prohibiting the states from imposing any labeling requirements on meat products which are in addition to or which differ from those promulgated under the Act by the United States Department of Agriculture:

". . . Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those

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\* Article VI, Cl. 2, of the United States Constitution provides in pertinent part:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

*made under this Chapter may not be imposed by any State or Territory or the District of Columbia with respect to articles prepared at any establishment under inspection in accordance with the requirements under subchapter I of this Chapter. . . .*" (Emphasis supplied.)

Additional language in Section 408 corroborates this unequivocal negative command by providing:

"This chapter shall not preclude any State . . . from making requirement or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter." (Emphasis supplied.)

By only permitting state action with respect to "other" matters, and by requiring that such activity be "consistent with" the Act, Congress reaffirmed its intention to preclude all state labeling regulation. The Court of Appeals for the Sixth Circuit, as well as the Court of Appeals for the Ninth Circuit, in this case, have held that Section 408 means what it says. *Armour v. Ball*, 468 F.2d 76, 84 (6th Cir., 1972), cert. denied, 411 U.S. 981 (1973). There are no contrary decisions.

It is equally clear that the California requirements at issue violate Congress' proscriptive intent. For, as the opinion of the Court of Appeals recognizes (*Jones Pet. App.*, at 28; 530 F.2d at 1314), the California authorities have attempted to regulate net weight labeling in a manner significantly different from that undertaken by the federal government.

In Section 1(n)(5) of the Wholesome Meat Act, Congress has required that all meat and meat food products bear a label showing "an accurate statement of the quantity of the contents in terms of weight", and has provided further that "reasonable variations may be permitted . . . by regulations prescribed by the Secretary." Pursuant



to that statutory direction, the Department of Agriculture has provided in 9 C.F.R. § 317(h)(2) that "reasonable variations caused by loss or gain of moisture during the course of good distribution practices . . . will be recognized." These regulations impact directly on this case, which involves moisture-bearing meat products.

In contrast, the California regulation of net weight, as enforced, requires accurate weight on the average at retail, at the time of weighing, without making any provision for reasonable variations caused by diminution of moisture content during the course of distribution. (Jones Pet. App., at 28; 530 F.2d at 1314.) Precisely because of this conflicting definition of "accurate statement", and *despite full compliance with federal law*, petitioner's inspectors considered the respondent's products to be "misbranded" and ordered them off-sale (App., at 60, 61, 81, 82, 83, 98, 99).

Moreover, apart from California's refusal to allow for reasonable variation in net weight attributable to loss of moisture content by evaporation, the California weighing procedure differs from that adopted by the Department of Agriculture in that the state officials subtract the weight of those portions of the product absorbed into the wrapper from the gross package weight (App., at 95, 102, 103), while the federal officials merely subtract the weight of a dry wrapper (App., at 83, 95).

Thus, the California approach to net weight labeling does differ in significant degree from the federal regulation, and directly contravenes the expressed preemptive intent of Congress. Moreover, as explained in Section III, below, the California requirements exemplify the

practical difficulties created by the imposition of individual state labeling standards.

Petitioner's only response to this unavoidable conclusion is to suggest, in what the Court of Appeals classified as a "strained" argument (Jones Pet. App., at 28, fn. 25; 530 F.2d at 1314), that California is merely exercising its "concurrent jurisdiction" under Section 408 of the Wholesome Meat Act\* to prevent distribution of "misbranded" food articles and, thus, is not imposing additional or different "labeling" requirements, as such (Pet. Br., at 40, 41). This argument, however creative, is totally without substance.

Whatever jurisdiction the states may have to "concurrently" *prevent distribution* of "misbranded" meat food products, it is beyond question that the Secretary of Agriculture, *alone*, and not the states, is authorized to define what products are and what products are not "misbranded". The artificial distinctions drawn by petitioner between "mislabeling" and "misbranding" are not supported by the statute. Rather, the Wholesome Meat Act carefully equates misbranding with mislabeling by providing that a meat product will be considered to be misbranded "if its labeling is false" (21 U.S.C. § 601(n)(1)) or "unless it bears a label showing . . . an accurate statement of the quantity of the contents in terms of weight" (21 U.S.C. § 601(n)(5)).

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\* In addition to the preemption language quoted at pp. 6-7, above, Section 408 goes on to provide that,

" . . . any State . . . may, consistent with the requirements under this chapter, exercise concurrent jurisdiction with the Secretary over articles required to be inspected under said subchapter I, for the purpose of preventing the distribution for human food purposes of any such articles which are adulterated or misbranded. . . ."

Moreover, the "labeling" requirements, as set forth in the Department of Agriculture's regulations, include not only restrictions as to what will constitute "reasonable variation caused by loss or gain of moisture during the course of good distribution practices", but, also, state in the same section and manner, the type size to be utilized for net weight labeling, the location on the display panel where the net weight information is to appear, the form of language to be used, and similar procedural matters. Absolutely no distinction of the type suggested by petitioner is drawn between the "format" of the label and the "substantive" means of determining its accuracy.

Thus, if a state were permitted at any time to impose its own definition of "misbranding" and to regulate or recall products for violation thereof, the express requirement in Section 408 that states may not regulate "labeling" differently than the United States would be rendered totally nugatory. That is, a state might set any standard it wished, broad or restrictive, with regard to the format of a label, size of type or emphasis, as well as methods of determining net weight, and act to recall the product at will, without concern for the uniform standards adopted by the Department of Agriculture under congressional mandate. That is clearly not what Congress intended when it stated, in unequivocal language, that

"labeling . . . requirements in addition to, or different than, those made under [the Wholesome Meat Act] may not be imposed by any State. . . ." (Bracketed material supplied.)

Petitioner's contention at p. 40 of its Brief that it is not telling respondents what to say on its label or otherwise imposing any "labeling requirements" is pure sophistry. Certainly there is nothing inherently unlawful in selling packages of bacon, which, by virtue of unavoid-

able moisture loss, weigh less than their original packed weight of 16 ounces. Yet, petitioner is removing those items from retail shelves, if their labels do not reflect that fact. Quite simply, petitioner is *requiring* meat food packers to conform their *labels* to a net weight definition set by the State of California rather than to the exclusive standard established by the United States Department of Agriculture.

Petitioner's reliance on Section 402 of the Act, 21 U.S.C. § 672, is similarly misplaced. That Section does not in any way "indicate an explicit recognition by Congress" of the validity of state laws regulating net weight labeling as petitioner suggests (Pet. Br., at 41). Rather, it merely provides for detention of meat food products by the Secretary of Agriculture when any federal *or* state law, relating to inspection, adulteration, misbranding, or distribution, has been violated. Thus, far from indicating a specific intent to provide for state net weight labeling regulation in direct contravention of the express preemptive language of Section 408, the language would more reasonably be read to apply to state regulation of intra-state operations, concurrent state enforcement of federal misbranding standards, or other authorized areas of state participation in the regulatory process.

In refusing to accept a narrow, literal construction of statutory language that "would produce incongruous results," this Court stated in *Mastro Plastics Corp. v. Labor Board*, 350 U.S. 270, 285 (1956):

"If the above words are read in complete isolation from their context in the Act, such an interpretation is possible. However, 'In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.' *United States v. Boisdore's Heirs*, 8 How. 113, 122."



*Accord, Labor Board v. Lion Oil Co.*, 352 U.S. 282, 288 (1957). So here, even if the language in Sections 402 and 408 of the Wholesome Meat Act, when read in "complete isolation", could be interpreted to provide for the imposition of state definitions of "misbranding", that narrow interpretation would produce a result which directly conflicts with the unmistakable preemptive language of Section 408, the definition of "misbranding" in the Act and the overall policy of uniform federal regulation, which, as discussed in Section III, below, underlies the Act.

In order that the federal inspection services may be supplemented and strengthened by the inspection services of the states, concurrent jurisdiction is given to the states to assist in preventing the distribution of "misbranded" food. But it is the federal statute which determines what meat and meat food products are "misbranded", and a state may not rewrite that statute by substituting its own definition of a "misbranded" product for that decreed by Congress.

"The concurrent action of a State, permitted by this language, only applies to adulterated or *misbranded* articles. *These words are necessarily used as defined in the Act.*" *Armour v. Ball*, *supra*, at 84. (Emphasis supplied.)

There is no rational basis for concluding that Congress, by merely authorizing "consistent" and "concurrent" state jurisdiction to prevent distribution of misbranded articles, intended to permit the states to establish their own inconsistent labeling standards, when in the very same paragraph it unequivocally prohibited imposition of such labeling requirements by those same states.

Finally, it is difficult to understand the relevance of petitioner's detailed discussion of Handbook 67 (Pet. Br.,

at 19-26). Even if the California regulations at issue were identical to those contained in Handbook 67, and they are not, petitioner's suggestion that the Handbook provides a "federal" standard (Pet. Br., at 19), and thus is somehow entitled to precedence over the standard established by the Secretary of Agriculture under the Wholesome Meat Act, is unsupportable. Handbook 67 is published by the National Bureau of Standards, pursuant to 15 U.S.C. § 272, which merely authorizes the Secretary of Commerce to *cooperate* with the states in securing uniformity in weights and measures laws and methods of inspection, and to *compile* and *publish* general technical data in connection with that function. As petitioner appears to recognize at pp. 20-21 of its brief, the Handbook does not exceed this limited authority. That is, the Handbook is merely a suggestive technical guidebook for states to follow or ignore as they deem appropriate. It is not in any sense mandatory, has no federal statutory effect, and certainly does not purport to override or interfere with the Secretary of Agriculture's specific authority created by the preemptive language of the Wholesome Meat Act.

The Wholesome Meat Act provides for exclusive regulation of net weight labeling of meat and meat food products, and *any* state requirements "in addition to or different than" those imposed by the Secretary of Agriculture are specifically prohibited. Since the state regulations at issue fall within that proscription, it is of no consequence whether those regulations bear similarity to the guidelines proposed in Handbook 67.



## II.

**THE INTENT OF CONGRESS TO PREEMPT STATE REGULATION OF NET WEIGHT LABELING AS EXPRESSED IN THE WHOLESALE MEAT ACT IS SUPPORTED BY THE LEGISLATIVE HISTORY OF THAT STATUTE.**

While this Court has repeatedly recognized that the literal language of a statute provides the foremost guide to its interpretation, and that there is little need to resort to legislative history where the provisions of the statute are clear and unequivocal on their face, *United States v. Oregon*, 366 U.S. 643, 648 (1961); *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 83 (1932), it is nevertheless significant that the legislative history of the Wholesome Meat Act and associated enactments fully supports the conclusion that Congress intended to preempt state regulation of net weight labeling. *Cass v. United States*, 417 U.S. 72, 77-79 (1974); *Train v. Colorado Public Interest Group, Inc.*, 44 U.S.L.W. 4717, 4719 (U.S., June 1, 1976).

To begin, the historical record is replete with statements which do little more than paraphrase the proposed statutory language, but which nonetheless reflect the unmistakable intent of Congress, as expressed in Section 408, to preclude state activity.

For example, when the House Subcommittee submitted H.R. 12144, containing Section 408, to the Committee on Agriculture, the principal provisions of Subchapter IV were summarized in relevant part as follows:

“Provide for separation of authority between State and Federal Governments regarding the inspection of meat and meat products. States would be prohibited from regulating federally inspected plants whose operations are governed by title I. Any recordkeep-

ing and related requirements proposed by States for federally inspected plants must be in conformance with the Federal Meat Inspection Act. States could not impose marking, labeling, packaging, or ingredient requirements in addition to or different from Federal requirements for products prepared under Federal inspection.” (Emphasis supplied.) H.R. Rep. No. 653, 90th Cong., 1st Sess. at 7 (1967).

And, when the Subcommittee of the Senate Committee on Agriculture and Forestry conducted Hearings in November of 1967 with respect to the proposed legislation, it analyzed the preemptive language of Section 408 in the following manner:

“Section 408 would exclude States . . . from regulating operations at plants inspected under title I or from imposing marking, labeling, packaging, or ingredient requirements in addition to or different than those under the Federal Meat Inspection Act for articles prepared under inspection in accordance with title I of the Act, but would permit them to impose recordkeeping and related requirements with respect to such plants if consistent with the Federal requirements. . . .” (Emphasis supplied.) *Hearings on S. 2147, S. 2218 and H.R. 12144 Before a Subcom. of the Senate Comm. on Agriculture and Forestry*, 90th Cong., 1st Sess. at 50 (1967).

Later in those Hearings, an explanation of the preemptory language was provided by the Deputy Assistant Secretary of Agriculture:

“States would be precluded from imposing additional or different labeling or packaging requirements for federally inspected products.” *Id.* at 63.

And, just before enactment by the Senate on November 28, 1967, Senator Dirksen supplied his understanding of the section in issue:

“States would be prohibited from imposing on federally inspected establishments requirements with respect to premises, facilities, operations, labeling, pack-

aging, and ingredients that were in addition to or different from those of the U. S. Department of Agriculture." 113 Cong. Rec. 33987 (1967). (Remarks of Senator Dirksen.)

See also Senate Report No. 799, providing that:

"Section 408 would exclude States, territories, and the District of Columbia from . . . imposing marking, labeling, packaging, or ingredient requirements in addition to or different than those under the Federal Meat Inspection Act for articles prepared under inspection in accordance with title I of the act, but would permit them to impose recordkeeping and related requirements with respect to such plants if consistent with the Federal requirements and to impose requirements consistent with the Federal provisions as to other matters regulated under the act." *U. S. Code Congressional and Administrative News*, 90th Cong., 1st Sess., vol. 2, p. 2207 (1967).

Perhaps the most directly relevant statement was provided by the Association of Food and Drug Officials of the United States which was strongly opposed to the adoption of Section 408. While the Association was very critical of Department of Agriculture regulation, it recognized the unmistakable effect of the proposed legislation:

"Section 408 . . . continues to strip the states of their traditional authority to protect their citizens by preempting the area of labeling, packaging, of ingredients requirements. The conditions which constitute misbranding and adulteration as defined in this bill for the first time in a federal meat inspection bill are almost identical with those which are part of the food laws of nearly every state. These food laws have been enforced by the states in their older forms or the present forms for sixty years. Their terms apply to meats as well as to other foods. \* \* \* These would be voided by the passage of this section of HR 6168." (Emphasis supplied.) *Hearings on H.R. 1314, H.R. 1321 and H.R. 6168 Before the Subcom. on Livestock and Grains of the House Comm. on Agriculture*, 90th Cong., 1st Sess., at 189, 191 (1967).

Equally conclusive indications of an intent to preclude state labeling regulation can be derived from congressional activity which followed judicial consideration of the preemptive language.

For example, in 1973, after the United States Court of Appeals for the Sixth Circuit had held in *Armour v. Ball*, *supra*, that Congress had intended to preclude all state regulation, and this Court had denied certiorari, a bill was introduced in Congress to amend Section 408 of the Wholesome Meat Act by striking the phrase "in addition to, or different" from the clause under consideration here, and inserting the phrase "less strict" in lieu thereof. H.R. 1752, 93d Cong., 1st Sess. (1973). This proposed amendment, which was intended to change the existing law so as to authorize states to impose labeling requirements stricter than those issued by the Department of Agriculture, never reached the floor of Congress. As this Court recently concluded in *Runyon v. McCrary*, 44 U.S. L.W. 5034, 5038 (U.S., June 25, 1976), there "could hardly be a clearer indication of congressional agreement" with a court's interpretation of a statute than legislative rejection of an amendment specifically designed to overcome that decision.

Apart from the obvious import of the congressional rejection of H.R. 1752, a number of specific statements made during the course of Hearings on that amendment, which further clarify the original preemptive intent of Congress, are worthy of note.

First, the official position of the Department of Agriculture is set forth in a letter dated July 16, 1973, to Hon. W. R. Poage, Chairman of the House Committee on Agriculture. In that letter, the Department stated its opposition to enactment of the amendment, recognized that the bill would serve to change existing law which provided for



uniform national standards and procedures, and set forth the problems which enactment would engender:

"The bill's proposed amendment to section 408 of the Federal Meat Inspection Act would cause administrative and consumer-related problems far outweighing any benefits which might be gained. It would, by implication, permit each State to establish its own more strict requirements for marketing, labeling, packaging and ingredients. As a result, federally inspected meat products could be barred from sale by jurisdictions with more stringent standards, thereby hampering the free flow of such products in interstate commerce. In addition, there could be a dual Federal-State system of regulation of federally inspected establishments with the State requirements prevailing over Federal provisions.

• • •

"If this bill were enacted, consumers could be denied the wide choice of products now available. Industry would be burdened with the task of producing labeling and packing its meat products in many different ways in order to comply with the diverse requirements of jurisdictions where the establishments are located or into which products are shipped. The result would well be chaos in this nation's food marketing system. Ultimately the cost would be passed on to the American consumer, thus contributing to higher food costs." *Hearings on H.R. 1752 Before the Subcom. on Livestock and Grains of the House Comm. on Agriculture*, 93d Cong., 1st Sess. at 1, 2 (1973).

Later in the Hearings, Mr. Clayton Yeutter, Assistant Secretary of Agriculture, was even more specific in an exchange with Congressman Sisk:

"Mr. Sisk. As I understand, Mr. Secretary, the position taken by the Department in connection with the pending lawsuit and others is that when Congress passed the Federal meat inspection law, that in fact preempted State law for purposes of interstate commerce.

"Mr. Yeutter. Yes, sir.

"Mr. Sisk. I appreciate the comments of the gentleman. I think basically the Department is right in that matter. I don't think it was any question but the intent of the Congress to preempt the right of the States. We have done this in many, many other areas in which there is total preemption and this is what Congress did in this case." *Id.* at 12, 13.

The full statement of Mr. Yeutter provides further clarification:

"The bill's proposed amendment to section 408 of the Federal Meat Inspection Act would in effect permit the establishment of fifty different sets of State-imposed standards for federally inspected meat food products. We believe such a result would contradict the original intent of Congress in enacting the Federal Meat Inspection Act, would seriously impede the flow of meat food products in interstate commerce, and would bring about higher food prices for consumers.

• • •

"The proposed amendment to section 408 would negate the expressed intent of Congress that inconsistencies be avoided and uniformity be promoted." *Id.* at 20.

As this Court has recognized, statutory interpretations by an affected agency are entitled to much weight, particularly when that agency participated in the enactment of the subject legislation. *Zuber v. Allen*, 396 U.S. 168, 192 (1969); *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 164 (1942); *Mintz v. Baldwin*, 289 U.S. 346, 351 (1933).

While officials of the State of Michigan, whose regulations were invalidated in the *Armour v. Ball* litigation, and sponsoring congressmen from Michigan, indicated their belief during the Hearings that Congress did not intend to preempt state regulation, all objective commentators appear to have concluded that Congress intended precisely what it stated, that "labeling . . . require-



ments in addition to, or different than, those made under [the Wholesome Meat Act] may not be imposed by any State. . . ."

It is interesting to note, as well, that the decision of the United States District Court *in this case* also prompted a Member of Congress from California to support the proposed amendment to Section 408, during the Hearings, and at the same time to recognize the preemptive impact of the existing statutory language:

"As I am sure the Subcommittee is aware, recent court decisions have put California's law regarding weights and measures in jeopardy. The County of Los Angeles brought suit against a meat packing company because their packages of meat were consistently found to be short weight at the time of sale. However, the Federal court decided that the state could not apply its stricter laws to meat products which were federally inspected, because this would preempt the Federal laws governing products sold in interstate commerce.

"Under present law this decision was appropriate. I feel, however, that the State of California should have the right to provide California consumers with greater protection in the market place, as the California State Legislature decides." (Emphasis supplied.) *Hearings on H.R. 1752 Before the Subcom. on Livestock and Grains of the House Comm. on Agriculture*, 93d Cong., 1st Sess. at 120, 121 (1973). (Remarks of Rep. Edwards.)

Finally, special note should be taken of the impact of the judicial decisions in *Swift & Co. v. Wickham*, 230 F. Supp. 398 (S.D.N.Y., 1964), *aff'd*, 364 F.2d 241 (2d Cir., 1966), *cert. denied*, 385 U.S. 1036 (1967), and the apparent congressional response to them. In that case, the District Court, finding no unambiguous congressional mandate that the Poultry Products Inspection Act, 21 U.S.C. § 451, *et seq.*, was intended to exclude state regulation of net weight labeling for frozen turkeys, held against preemp-

tion. 230 F. Supp. at 406. The Court of Appeals then affirmed, agreeing that Congress had not "unmistakably ordained" that the federal Act was intended to oust the states from regulatory jurisdiction. 364 F.2d at 244. Significantly, in the following year, Congress *amended* the Poultry Products Inspection Act by adding preemptive language identical to that appearing in Section 408 of the Federal Wholesome Meat Act:

"... Marking, labeling, packaging, or ingredient requirements . . . in addition to, or different than, those made under this chapter may not be imposed by any State . . . with respect to articles prepared at any official establishment in accordance with the requirements under this chapter, but any State . . . may, consistent with the requirements under this chapter, exercise concurrent jurisdiction with the Secretary . . . for the purpose of preventing the distribution of any such articles which are . . . misbranded." 21 U.S.C. § 467e (1968).

The importance of this sequence of events is underlined by the testimony of Dr. Robert K. Somers, Deputy Administrator of the Consumer and Marketing Service of the Department of Agriculture, to the effect that the specific language utilized in Section 408 of the Wholesome Meat Act was designed to evidence a congressional intent to provide federal authority for the establishment of standard marking, labeling, packaging and ingredient requirements. In reaching this conclusion, Dr. Somers significantly indicated that specific language was necessary because ambiguous language of the Poultry Act had recently caused litigation to be pursued all the way to the United States Supreme Court. *Hearings on H.R. 1314, H.R. 1321, and H.R. 6168 Before the Subcomm. on Livestock and Grains of the House Committee on Agriculture*, 90th Cong., 1st Sess., at 25, 26 (1967).

Petitioner has relied upon the decision in the *Swift* litigation to support the general proposition that the regu-

lation of weights and measures is "one of the oldest exercises of governmental regulatory power." (Jones Pet., at 25.) It is submitted that closer analysis of that case and its congressional aftermath provides a far more significant subject for this Court's consideration.

### III.

#### THE INTENT OF CONGRESS TO PROMOTE A UNIFORM NATIONAL REGULATORY SCHEME FOR NET WEIGHT LABELING OF MEAT AND MEAT FOOD PRODUCTS WOULD BE DEFEATED IF THE STATES WERE PERMITTED TO IMPOSE DIFFERING REQUIREMENTS.

The Court of Appeals has stated, and petitioner recognizes, that the intent of Congress, when enacting Section 408 of the Wholesome Meat Act, was to create a uniform national labeling system. Petitioner argues, however, that to permit reasonable variations caused by loss or gain of moisture during the course of good distribution practice would negate that intent. (Pet. Br. at 18.) It is respectfully submitted that petitioner's arguments are misdirected and erroneous.

First, it is not the province of the State of California or petitioner to determine how the intent of Congress is to be effectuated. There may be honest dispute as to what measurement techniques are the most preferable. But, if the State of California, or any other governmental authority, believes that the Department of Agriculture regulations providing for reasonable variation are not adequate, their recourse is to that Department or to Congress. They cannot, by independent action, superimpose their own beliefs as to how net weight labeling should be regulated. Congress, in the exercise of appropriate constitutional authority, has expressed its intent to preclude state regulation in the interest of uniformity, and that expression represents the supreme law of the land.

Second, the regulatory procedures which petitioner would substitute for those mandated by Congress would in no way ensure the "uniformity" in labeling which petitioner concedes to be desirable.

Petitioner assumes, without justification, that all states would adopt California measurement techniques, rather than those applied by the Department of Agriculture, or other as yet unidentified standards—an assumption that must be made to support petitioner's conclusions. But how can petitioner ensure that the states which have expressed interest in this litigation by filing *amicus curiae* briefs, or, indeed, those states which have not supported petitioner's cause, would conform their regulation and enforcement procedures to that adopted by California? Would some states provide for reasonable diminution of moisture content during distribution while others totally ignore evaporation loss? Would some states deduct a dry wrapper when computing net weight while others subtract the portion of the meat product absorbed into the wrapper as well? No one can provide answers to these questions. But the very uncertainties engendered by them refute petitioner's simplistic effort to prove that regulation of net weight labeling by the states would result in national uniformity.

Moreover, apart from potential differences in measurement techniques among the states, it must be recognized, as Congress has directed, that there are other factors to be considered when developing fair, uniform requirements for an industry operating on a *nationwide* basis. For example, the federal standard, unlike that applied by California, takes into account deviations in moisture content which are a direct function of distribution time. As the uncontroverted testimony in this case indicated, one pound of bacon will lose approximately 1/16th of an ounce of



moisture by evaporation between the time it is packaged and weighed and the time it is placed in the distribution stream (App., at 90, 91, 94). Thereafter, while nutritional value is not affected, that same bacon will continue to lose .3 to .4 sixteenths of an ounce of moisture per day until it is sold at retail (App., at 94, 95). When it is further recognized that the wrapper (which is deducted from gross weight under California measurement techniques) will absorb significant portions of the product during distribution, it is apparent, under petitioner's approach, that a national meat packer would have to carefully tailor the gross weight of each of his products for different markets depending upon the proximity of the ultimate retail outlet and the efficiency of transportation facilities. Thus, a package of meat products that meets petitioner's so-called "accurate" standard in Omaha, Nebraska, may well prove underweight when measured by the identical standard in Riverside County, California. Unless reasonable deviations are permitted, as the Department of Agriculture has recognized, the respondent would be subjected to an unreasonable burden, and the consumer would be required to bear the costs associated with that burden. (See statements of the Department of Agriculture, quoted at pp. 17-19, *supra*.)

In addition, there are other problems potentially affecting the nationwide meat packing industry which petitioner fails to consider. Differences in the relative humidity between given geographical areas are likely to affect the rate of evaporation and resultant weight loss. Also, the average shelf time may vary from area to area and store to store depending upon consumer buying habits, retail selling policies, seasonal food preferences, economic conditions and similar factors. It is just these types of factors which the federal standard, providing for reasonable

variations, takes into account. And, it is the same type of reasonable deviations, and the difficulties in conforming with them, which the California standard, however accurate, would ignore.

Finally, a decision permitting individual states to impose differing labeling requirements would not only have an adverse impact on the meat packing industry, but would dramatically alter the regulatory responsibilities of the Department of Agriculture, as well. Since packers would be required to meet a variety of state net weight standards, federal inspectors would be obligated to supervise packing operations so as to ensure that each product conforms with the relevant state standard and is not misbranded. Similarly, under Section 7 of the Wholesome Meat Act, 21 U.S.C. § 607, Department of Agriculture officials would be obligated to review and approve, in advance of their use, all labels required for all products by all states electing to regulate. In essence, the federal government would be expending its major efforts administering a wide variety of state requirements rather than enforcing its own uniform and pervasive regulatory scheme.

As the Assistant Secretary of Agriculture testified in the 1973 Congressional Hearings relating to the proposed amendment to remove the preemptive language of Section 408,

"Just looking at labels alone and ignoring all the other six areas, we processed 181,000 labels this last fiscal year at a cost of something over \$400,000, an average of a little better than \$2 per label. If the Interstate meatpacking firms had to process label changes every time a State changed its label regulations, this 181,000 would end up being many, many hundreds of thousands, depending on the number of States that had regulations that were different from



the Federal. Of course, it would have an obvious impact on our processing of all those label changes as well as on providing surveillance over any changes in premises, equipment, and so on.

"The cost to the Federal meat inspection program is inestimable, but it is bound to be a very significant factor, and we think it is totally unjustified. It obviously serves as a trade barrier too." *Hearings on H.R. 1752 Before the Subcomm. on Livestock and Grains of the House Comm. on Agriculture*, 93d Cong., 1st Sess. at 10, 11 (1973).

Recognizing the practical difficulties which a patch-work quilt of state regulations would create, and focusing as well on the intolerable burdens associated with meeting an absolute weight standard in different geographical areas, Congress has exercised its constitutional right to preempt state regulation of net weight labeling. However dissatisfied petitioner may be with that exercise of legislative authority, it must, under the Constitution of the United States, bow before it.

### CONCLUSION

To date, the preemption language of the Wholesome Meat Act of 1967 has been placed directly at issue in three cases. The Appellate Division of the New York Supreme Court invalidated New York City's meat labeling requirements while concluding that Section 408 of the Wholesome Meat Act "has explicitly ordained that the Secretary of Agriculture has exclusive jurisdiction of the labeling requirements of meat products produced in federally inspected meat packing plants." *Meat Trade Institute, Inc. v. McLaughlin*, 326 N.Y.S.2d 683, 37 A.D.2d 456 (1971).

The United States Court of Appeals for the Sixth Circuit has declared that "in view of its unambiguous language, Section 408 reflects unequivocal legislative purpose

to make the Federal [Wholesome Meat] Act preemptive." *Armour v. Ball, supra*, at 84-85. And, the United States Court of Appeals for the Ninth Circuit has concluded in this action, "from the clear language and legislative history of" Section 408, that "Congress has unmistakably . . . ordained" its intent to preempt state regulatory power with regard to net weight labeling (*Jones Pet. App.*, at 26; 530 F.2d at 1313).

For the reasons set forth in those opinions, and reiterated herein, the American Meat Institute, on behalf of its members, respectfully requests this Court to affirm the judgment of the Court of Appeals invalidating petitioner's efforts to regulate net weight labeling of meat products.

Respectfully submitted,

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Supreme Court, U. S.

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IN THE

**Supreme Court of the United States**

October Term, 1976

No. 75-1053

JOSEPH W. JONES, as Director of the County of Riverside  
California, Department of Weights and Measures,  
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*Respondents.*

On Writ of Certiorari to the United States Court of Appeals  
for the Ninth Circuit.

**BRIEF OF THE NATIONAL INDEPENDENT MEAT PACKERS  
ASSOCIATION, AMICUS CURIAE IN SUPPORT OF AFFIR-  
MANCE IN THE RATH CASE**

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*Respondents.*

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On Writ of Certiorari to the United States Court of Appeals  
for the Ninth Circuit.

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**BRIEF OF THE NATIONAL INDEPENDENT MEAT PACKERS  
ASSOCIATION, AMICUS CURIAE IN SUPPORT OF AFFIR-  
MANCE IN THE RATH CASE**

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The National Independent Meat Packers Association  
("NIMPA")<sup>1</sup> respectfully submits this brief as *amicus*

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<sup>1</sup> NIMPA has filed with the Clerk of this Court the respective con-  
sents of petitioner and respondent to NIMPA's filing of the instant  
brief *amicus curiae*. In addition, with the consent of the respective par-  
ties, the following state or regional trade associations join with NIMPA  
in its support of respondent Rath: the Greater New York Association of  
Meat and Poultry Dealers, the Kentucky Meat Processors Association,  
the Meat Trade Institute (New York), the New England Wholesale  
Meat Dealers Association, and the Pennsylvania Meat Packers  
Association. The respective memberships of these associations are com-  
prised in whole or primarily of concerns operating establishments sub-  
ject to federal inspection.

*curiae* urging affirmance of the judgment of the Court of Appeals for the Ninth Circuit entered in *Jones v. Rath* on October 29, 1975.<sup>2</sup>

### QUESTION PRESENTED

The specific question presented in the *Rath* case is whether the application by the State of California to meat products prepared in an establishment under inspection by the United States Secretary of Agriculture pursuant to the federal Wholesome Meat Act of 1967 (21 U.S.C. §601 *et seq.*, hereinafter "the Meat Act") of certain state requirements (hereinafter specified) with respect to the labeling of the net weight of meat products constitute the imposition of state labeling requirements "in addition to, or different than" the federal requirements in contravention of 21 U.S.C. §678. This question therefore is one of preemption bottomed in Article VI, Clause 2 of the Constitution of the United States.

### INTEREST OF NIMPA AS AMICUS

NIMPA is a trade association, organized and existing as a non-profit corporation under the laws of the District of Columbia. NIMPA's membership is composed of approximately 275 concerns engaged in the slaughter of animals and the preparation of meat products for human consumption. Most of NIMPA's members prepare meat products for distribution in interstate commerce. Many members of NIMPA, like respondent Rath, prepare for shipment in interstate commerce bacon and other products which are subject to what is known in the industry as "shrink", that is, the loss of moisture (and therefore weight) due to evaporation.

<sup>2</sup> The instant brief does not treat the opinion of the Court of Appeals for the Ninth Circuit in *Jones v. General Mills* inasmuch as that case does not concern meat products.

The premises, facilities and operations of the NIMPA member concerns which prepare meat products for distribution in interstate commerce<sup>3</sup> are subject to inspection by the Secretary of Agriculture (hereinafter "the Secretary") to assure that such products are not "adulterated" as that term is defined in the Meat Act. 21 U.S.C. §601(m). These concerns are also subject to the regulatory authority vested in the Secretary by the Meat Act to assure that meat products prepared under federal inspection are not "misbranded" as that term is defined in the Meat Act. 21 U.S.C. §601(n). The basic proscription of the Meat Act is the sale, transportation, or offer for sale or transportation, of meat products which are adulterated or misbranded, or which have not been inspected and passed when so required. 21 U.S.C. §610(b).

A meat product is deemed "misbranded" under the Meat Act *inter alia*:

[I]f in a package or other container unless it bears a label showing (A) the name and place of business of the manufacturer, packer, or distributor; and (B) *an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count: Provided, That under clause (B) of this subparagraph (5), reasonable variations may be permitted, and exemptions as to small packages may be established, by regulations prescribed by the Secretary.* [21 U.S.C. §601(n)(5); emphasis added.]

<sup>3</sup> The membership of NIMPA also includes packing concerns which prepare meat products solely for distribution in *intrastate* commerce but which operate establishments in so-called "designated states". A designated state is one in which the Secretary has taken over meat inspection activities as a result of a finding by the Secretary that the state has not developed or is not enforcing "requirements at least equal to" the federal requirements. 21 U.S.C. §661(c)(1).



This labeling requirement, which is but one of twelve specific requirements set forth in §601(n), is the labeling requirement at issue here.

Congress has enunciated a comprehensive set of labeling requirements and has vested paramount regulatory authority in the Secretary under the Meat Act on the subject of labeling. Pursuant to that authority, the Secretary has promulgated a regulation which states that "... no label shall be used on any product until it has been approved in its final form by the Administrator [of the Animal and Plant Health Inspection Service of the Department of Agriculture]." 9 C.F.R. §317.4. Thus, in order for a label to be approved prior to its use, or for it to continue in use, representatives of the Secretary must make a determination that it will not cause the product to which it is affixed to be misbranded under any subpart of 21 U.S.C. §601(n). The Secretary's authority not only reaches labeling after the fact but in its incipency.

In view of the all-pervasive federal regulatory scheme embodied in the Meat Act, packers subject to regulation by the Secretary should be able to rely on the necessary underlying determinations of the Secretary's representatives that the labels accurately represent the contents (both weight and composition) of packages to which such labels are affixed. That the exercise of independent authority by the states in the area of labeling of meat products once they are outside a federally inspected establishment would subject federally inspected packers to a crazy-quilt of state labeling requirements is readily apparent. If such authority lawfully could be exercised by the states, packers which ship their products in interstate commerce would be faced with the impossible task of adhering to the federal labeling requirements, as well as those of each state into which their products are shipped, no matter how different one state's requirements might be from the federal requirements, or from another state's requirements. But Congress wisely

sought to foreclose this inevitable burden on commerce by incorporating into §408 of the Meat Act (21 U.S.C. §678, hereinafter "§678") an express prohibition against the imposition by any state of "[m]arking, labeling, packaging, or ingredient requirements in addition to, or different than," those made under the Meat Act.

If the position of the State of California in this case were to be sustained by this Court, federally inspected packers would not be subject to the labeling requirements of a single master — Congress and the Secretary acting pursuant to the Meat Act — but to fifty other masters — the state legislatures and state officials acting pursuant to their respective statutes or regulations. Moreover, while this case arose in the context of the labeling of the net weight of a particular meat product (bacon), we perceive no distinction between the multitude of other aspects of labeling which could cause a meat product to be misbranded under §601(n). In short, if, as it urges here, the State of California has the authority to implement its own standards for testing the accuracy of statements of net weight on labels of products manufactured in federally inspected establishments and can ignore the federal standards therefor, it likewise would have the authority to set its own standards for determining, *notwithstanding a prior contrary determination by the Secretary*, that a meat product is "misbranded" in some other respect, *e.g.*, that its "labeling is false or misleading" in some particular (§601(n) (1)); that it has been "offered for sale under the name of another food" (§601(n) (2)); that it is "an imitation of another food..." (§601(n) (3)); and so forth.

In sum, NIMPA believes that the very ability of federally inspected packers to continue to operate in interstate commerce without patently impermissible and destructive interference by the states is at stake in this case. For the State of California has attempted to read §678 out of the United States Code, and thereby to substitute itself—and by direct

implication each other state—for Congress (and the Secretary) as the ultimate authority in matters relating to the labeling of meat products prepared in federally-inspected establishments.

### STATEMENT OF THE CASE

NIMPA concurs in, and accordingly incorporates herein by reference, the detailed statement of the case of respondent Rath. Suffice it to say, by way of summary, that in 1971 agents of petitioner, the director of the County of Riverside Department of Weights and Measures, ordered "off sale" quantities of packaged bacon produced and labeled by Rath in a federally inspected establishment. In so doing, petitioner's agents were acting pursuant to California Business and Professions Code, §12211 (hereinafter "§12211") which authorizes such off sale orders "Whenever a lot or package of any commodity is found to contain, through procedures authorized herein, a less amount than represented". The procedures used to determine whether the packages of Rath's bacon contained a less amount than represented are set forth in 4 California Administrative Code, Chap. 8, Subchap. 2, Art. 5 (hereinafter "Article 5").

Rath instituted in the District Court an action to enjoin this conduct of petitioner on the ground that it constituted the imposition of state labeling requirements which were in addition to, or different than those imposed by the Meat Act in contravention of the preemption provision thereof (§678). The District Court granted the injunction sought by Rath against petitioner and also against M.H. Becker, the Director of the County of Los Angeles Department of Weights and Measures, and C.B. Christensen, the Director of Agriculture of the State of California. (Rath had instituted a separate action against Becker, in which Christensen had intervened, which action was tried and subsequently con-

solidated for decision with Rath's action against petitioner Jones.)

The Court of Appeals for the Ninth Circuit affirmed the District Court's grant of injunctive relief to Rath, the propriety of which was the sole issue presented by Jones' petition for writ of certiorari.

### ARGUMENT

- I. CONGRESS HAS PREEMPTED AND PRECLUDED CALIFORNIA (AND ANY OTHER STATE) FROM IMPOSING LABELING REQUIREMENTS THAT ARE "IN ADDITION TO, OR DIFFERENT THAN" THE REQUIREMENTS IMPOSED BY THE FEDERAL WHOLE-SOME MEAT ACT.

#### A. Federal Preemption Is Clearly Established In 21 U.S.C. §678

The bedrock of the doctrine of federal preemption is Article VI, Clause 2, of the United States Constitution, which states in pertinent part that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, under the Authority of the United States, shall be the supreme Law of the Land . . . ." In construing Clause 2 in a case such as the instant one, which involves a conflict between federal and state statutes, the guiding principle is that:

[F]ederal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons — either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained. [*Florida Avocado Growers v. Paul*, 373 U.S. 132, 142, *rehear. denied*, 374 U.S. 858 (1963). ]

Thus, although the nature of the subject matter regulated — meat products prepared and labeled under federal in-



spection — permits no conclusion other than one of federal preemption, it is not necessary here to reach that conclusion by inference. For Congress in 21 U.S.C. §678<sup>4</sup> ordained its will as to the proper role of the states with respect to the labeling of meat products prepared under federal inspection.

Because §678 in our view is dispositive of this case, we quote it in its entirety:

Requirements within the scope of this chapter with respect to premises, facilities and operations of any establishment at which inspection is provided under subchapter 1 of this chapter, which are in addition to, or different than those made under this chapter may not be imposed by any State or Territory or the District of Columbia, except that any such jurisdiction may impose recordkeeping and other requirements within the scope of section 642 of this title, if consistent therewith, with respect to any such establishment. *Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State or Territory or the District of Columbia with respect to articles prepared at any establishment under inspection in accordance with the requirements under subchapter 1 of this chapter, but any State or Territory or the District of Columbia may, consistent with the requirements under this chapter, exercise concurrent jurisdiction with the Secretary over articles required to be inspected under said subchapter 1, for the purpose of preventing the distribution for human food purposes of any such articles which are adulterated or misbranded and are outside of such an establishment, or, in the case of imported articles which are not at such an establishment, after their entry into the*

<sup>4</sup> Pub. L. 90-201, §16, 81 Stat. 600.

United States. This chapter shall not preclude any State or Territory or the District of Columbia from making requirement or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter. [emphasis added].

Under §678 the states, although expressly precluded from imposing labeling requirements which are in addition to, or different than, the federal labeling requirements, are permitted to *enforce* the *same* requirements (*i.e.*, the federal requirements) with respect to federally inspected products outside federally inspected establishments, so long as such enforcement is *consistent* with the requirements of the Meat Act and the Secretary of Agriculture's enforcement thereof. Thus, the word "consistent", in the second sentence of §678, establishes the standard applicable to the states' *exercise* of concurrent jurisdiction, while the not "in addition to, or different than" standard refers to the substantive requirements themselves.<sup>5</sup>

Congress unquestionably was well-aware that, in order to avoid chaos in the distribution of products prepared under federal inspection and to promote uniformity in labeling, it would not be sufficient merely to make the states' substantive labeling requirements conform to the federal requirements; the states' *application* of those requirements must also conform to (*i.e.*, be consistent with) the federal

<sup>5</sup> The preemptive language of §678 reflects the special concern on the part of Congress with respect to marking, labeling, packaging, or ingredient requirements, as opposed to the "other matters regulated under this chapter" referred to in the last sentence of §678. As to such "other matters", the states' actions are limited only to the extent of being "consistent" with the federal requirements. As to marking, labeling, packaging, or ingredient requirements, however, a two-pronged restriction is placed on the states: (1) the states' substantive labeling requirements may not be in addition to, or different than, the federal requirements; and (2) the states' *exercise* of concurrent enforcement jurisdiction as to these matters must be consistent with the federal requirements and federal enforcement thereof.



application thereof. The consistency restriction on the states' authority, as a supplement to the act "in addition to, or different than" restriction, therefore was intended to make clear federal ascendancy in matters of interpretation and application, even where a state's labeling requirements, as embodied in statute or regulations, are the same as the requirements specified in the Meat Act or in regulations promulgated thereunder.<sup>6</sup> In this connection, the court in *Iowa Beef Processors v. Carbaugh*, Civil Action No. 608-74A (E.D. Va., November 27, 1974) enjoined the Commissioner of the Department of Agriculture and Commerce of the Commonwealth of Virginia from interfering with the marketing of a product bearing a federally approved label. In that case, the Commissioner was attempting to enforce a Virginia labeling requirement (1A Va. Code, §3.1-884.18(16)(g)) which was identical to 21 U.S.C. §601(n)(7), but pursuant to an interpretation of that requirement different from the Secretary's.<sup>7</sup>

Given the Congressionally mandated restrictions on the regulatory authority of the states with regard to the labeling of meat products prepared in federally inspected establishments set forth in §678, we now focus on the term

<sup>6</sup> Subsequent to the enactment of the Meat Act in 1967, many states adopted in their respective meat or food statutes the Meat Act's definition of "misbranded". See 2 Ala. Code Tit. 2, §401(53) (1951), as amended (1969); 8 Ariz. Rev. Stat., §24-601 (1956), as amended (1968); 7 Idaho Code Ann., §37-1901 (1961), as amended (1969); Ill. Ann. Stat., Ch. 56 1/2, §302.20 (1959), as amended (1969); Ind. Stat. Ann., Tit. 16, Art. 16-6-5-3 (1967), as amended (1969); 10A Iowa Code Ann., §189A.2 (1966), as amended (1969); 5 Kan. Stat. Ann., §65-6a-18 (1964), as amended (1969); Md. Code Ann., AG §4-101(p) (1974); 3A N.C. Gen. Stat., Art. 49B, §106-549.15 (1969); 1 Okla. Stat., Tit. 2, §6-181 (1968); 12 S.D. Com. Laws, §39-5-26 (1968); 12B Tex. Rev. Civ. Stat., Tit. 71, Art. 4476-7, §1(k) (1969); 1A Va. Code §3.1-884.18 (1970); 1 Wash. Rev. Code, §16.49A.170 (1969).

<sup>7</sup> The Findings of Fact and Conclusions of Law in this case, which are unreported, are set forth in the Supplemental Appendix attached hereto.

"misbranded" as used in that section. This term is defined in 21 U.S.C. §601(n) and the terms "label" and "labeling" are defined in §601(o) and §601(p), respectively.

Labeling is plainly the touchstone of the term "misbranded" as defined in the Meat Act. Each of the twelve subparts of §601(n) (except subpart (4)) refers expressly or by clear implication to a "label" or to "labeling". Thus, to determine whether a meat product is "misbranded" under the Meat Act, it is necessary to compare the statements on its label to the contents of the container to which the label is affixed. In short, labeling requirements are part and parcel of the concept of "misbranded". And, §678 makes it clear that if the Secretary should deem a product not misbranded, the states may not deem it misbranded, either by way of imposing a labeling requirement which is in addition to, or different than, the requirements under the Meat Act, or by way of applying the requirements of the Meat Act in a manner inconsistent with the Secretary's application thereof.

With respect to the relationship between the terms "labeling" and "misbranded", petitioner asserts that:

If, as indicated by the Ninth Circuit (Pet. App. 28 and 45), there is no substantial difference between "labeling", as used in the first part of section 678, and "misbranding", then the provisions of section 678 which speak of "articles which are adulterated and misbranded" are indeed redundant. Congress must not however be presumed to have performed an idle act in delineating the respective jurisdictional areas of the State and federal governments. [Pet. Br. 37, n. 29].

This assertion not only misstates the Ninth Circuit's opinion, but tortures the plain meaning of §678 beyond recognition. First, the Ninth Circuit simply did not indicate that there was no substantial difference between "labeling", as used in the first part of §678, and "misbran-

ding". What the Ninth Circuit did observe—and quite correctly—was that "We see no difference in substance between 'misbranding' and 'mislabeling' in this case." (Jones Pet. App. 45, 50 F.2d at 124, n. ; emphasis added). Second, as noted above, "labeling" is part and parcel of the definition of "misbranding" under the Meat Act. In short, contrary to petitioner's assertion, "misbranding" does not have a statutory or conceptual existence apart from "labeling", as to which even petitioner is willing to admit that he is precluded from imposing requirements in addition to, or different than, the federal requirements.

Petitioner also attempts to obviate the preemptive language of §678 by contending that:

Assuming again *arguendo* that there is federal preemption as to labeling in section 678, such preemption has little meaning in the case at bar. Labeling is a matter of format, not of substance behind the label. Jones has not imposed any labeling requirements. [Pet. Br. 40].

For petitioner to argue that "labeling" as used in §678 is a matter of format, but not of substance, is to ignore the definition of that term, as well as the definition of "misbranded" in the Meat Act. The statutory definition of "labeling" (§601(p)) makes no reference to "format", but encompasses "labels and other written, printed, or graphic matter" on a product or its container. More important, as noted above, the definition of "misbranded" makes repeated references to labeling as the means by which *substantive* information about the product (identity, ingredients, weight, etc.) is to be conveyed to purchasers. Accordingly, if labeling relates only to format, the statutory definition of "misbranded" would be meaningless. Finally, petitioner's assertion that he "has not imposed any labeling requirements" is disingenuous at best.\* For a labeling

\* In rejecting this argument, the Ninth Circuit generously characterized it as "strained". (Jones Pet. App. 28; 530 F.2d at 1314, n. 25).

requirement of petitioner — that statements of net weight on labels on the packages of Rath's bacon must comply with *California's* requirements — is precisely what this case is all about.

In sum, as the Ninth Circuit correctly held:

This language [§678] clearly shows the intent of Congress to create a uniform national labeling standard, under definitions set forth in the Wholesome Meat Act, including the definition of "misbranding" in §601(n). The express language of §678 implements this clear Congressional intent. [Jones Pet. App. 27-28, 530 F.2d at 1313-14].

#### **B. The Legislative History Pertaining To Section 678 Fully Comports With the Express Language Thereof**

As demonstrated above, the Congressional intent to preempt independent state regulation of the labeling of meat products prepared under federal inspection appears so clearly in the language of §678 that any reference to the legislative history pertaining to that section is unnecessary. "[W]hen the wording of an Act is plain and unambiguous, there is neither necessity nor justification for resort to legislative history to interpret its meaning." *Ohio Power Co. v. N.L.R.B.*, 176 F.2d 385, 387 (6th Cir. 1949) citing numerous decisions of this Court.

Nonetheless, reference here to the legislative history of the Meat Act, insofar as it relates to §678, is useful to underscore the clarity with which Congress expressed its intent in §678. The section-by-section analysis in H.R. Rep. No. 653, 90th Cong., 1st Sess., 27-28 (1967), states:

Section 408 [codified in 21 U.S.C. §678] would *exclude States, territories, and the District of Columbia* from regulating operations at plants inspected under title I



or from imposing marking, labeling, packaging, or ingredient requirements in addition to or different than those under the Federal Meat Inspection Act for articles prepared under inspection in accordance with title I of the act, but would permit them to impose recordkeeping and related requirements with respect to such plants if consistent with the Federal requirements and to impose requirements consistent with the Federal provisions as to other matters regulated under the act. [emphasis added].

The identical statement appears in S. Rep. 799, 90th Cong., 1st Sess., 2 1967 U.S. Code Cong. and Admin. News 2207, which accompanied S. 2147, a companion bill to H.R. 12144 which was enacted into law. Similarly, H.R. Rep. No. 653, at 7 states that:

Title IV contains auxiliary provisions to further implement the new "Federal Meat Inspection Act" and would:

\* \* \*

(7) Provide for separation of authority between State and Federal Governments regarding the inspection of meat and meat products. States would be prohibited from regulating federally inspected plants whose operations are governed by title I. Any recordkeeping and related requirements proposed by States for federally inspected plants must be in conformance with the Federal Meat Inspection Act. *States could not impose marking, labeling, packaging, or ingredient requirements in addition to or different from Federal requirements for products prepared under Federal inspection.* [emphasis added].

Thus, the preemptive language of §678 is so clear and self-explanatory that the references to it in the legislative history of the Meat Act are couched in virtually the same language as the statutory provision itself.

It should also be noted at this juncture that, within one year of the enactment of the Meat Act, Congress enacted amendments to the Poultry Inspection Act, which amendments included the addition thereto of a preemption provision (21 U.S.C. §467e)<sup>9</sup> which tracked the language of the Meat Act. The only difference in substance between the respective preemption provisions in the Meat Act and the amended Poultry Inspection Act is that the latter precludes the states from imposing "storage or handling requirements found by the Secretary to unduly interfere with the free flow of poultry products in commerce", as well as from imposing "[m]arking, labeling, packaging, or ingredient requirements . . . in addition to, or different than," the federal requirements. Thus, in the 1968 amendments to the Poultry Inspection Act, Congress not only extended to the regulation of poultry products the same preemption scheme theretofore accomplished with respect to the regulation of meat products, but also added storage and handling requirements to the specific subjects with respect to which state regulation was to be limited.

**C. The Regulatory Scheme Embodied In The Meat Act As A Whole Contradicts Petitioner's Assertion That Congress Intended To Preserve The States' Police Power On The Subject Of Labeling Of Meat Products.**

Although this Court need not go beyond the four corners of §678 to affirm the lower courts' finding of preemption in this case, an examination of the thrust of the Meat Act as a whole discloses a Congressional intent to impose federal supervision over, and indeed in certain circumstances total take-over of, state police powers on the subject of meat

<sup>9</sup> Pub. L. 90-492, §17, August 18, 1968, 82 Stat. 807. In H.R. Rep. No. 1333, 90th Cong., 2nd Sess., 3 1968 U.S. Code Cong. and Admin. News 3434, it is stated that "The decision was made to adhere, insofar as the subject matter permitted, as closely to the newly enacted meat legislation as possible."



products. This plainly-expressed intent of Congress belies petitioner's contention that the Meat Act was intended to be "protective" of state police powers (Pet. Br. 34).

Section 301 of the Meat Act, 21 U.S.C. §661, provides that:

(a) It is the policy of the Congress to protect the consuming public from meat and meat food products that are adulterated or misbranded and to assist in efforts of State and other Government agencies to accomplish this objective . . .

\* \* \*

(c) (1) *If the Secretary has reason to believe, by thirty days prior to the expiration of two years after enactment of the Wholesome Meat Act, that a State has failed to develop or is not enforcing, with respect to all establishments within its jurisdiction (except those that would be exempt from Federal inspection under subparagraph (2) ) at which cattle, sheep, swine, goats, or equines are slaughtered, or their carcasses, or parts or products thereof, are prepared for use as human food, solely for distribution within such State, and the products thereof, are prepared for use as human food, solely for distribution within such State, and the products of such establishments, requirements at least equal to those imposed under subchapter I and IV of this chapter, he shall promptly notify the Governor of the State of this fact. If the Secretary determines, after consultation with the Governor of the State, or representative selected by him, that such*

requirements have not been developed and activated, he shall promptly after the expiration of such two-year period designate such State as one in which the provisions of subchapters I and IV of this chapter shall apply to operations and transactions wholly within such State . . . . [emphasis added].

Further, Section 661(c) (1) authorizes the Secretary, in certain circumstances, to designate a particular establishment distributing meat product solely within a state as subject to federal inspection "as though engaged in commerce".<sup>10</sup> The extension of federal regulatory authority to meat packing concerns operating solely in intrastate commerce is bottomed in 21 U.S.C. §602, wherein it is stated that:

It is hereby found that all articles and animals which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce . . . .<sup>11</sup>

The regulatory scheme established by the Meat Act was clearly the response of Congress to inadequate state exercise of police power. While the legislative history of the

<sup>10</sup> Other key provisions of §661 authorize the Secretary to cooperate with state agencies in developing and administering state inspection programs in states which have enacted a state meat inspection law that imposes inspection requirements "at least equal to the federal requirements with respect to the slaughter of animals and the preparation of meat products for use as human food" solely for distribution within such state (§661(a) (1) ); and to furnish financial aid to states in the development and administration of such state programs (§661(a) (3)).

<sup>11</sup> The use of the terms "misbranded" and "mislabeled" as interchangeable terms elsewhere in §602 also serves to refute petitioner's arguments that California's regulatory activities at issue here do not concern "labeling" (or mislabeling) but only "misbranding".

Meat Act is replete with statements to this effect, the point was made bluntly by the House Committee on Agriculture: "The committee feels that a definite need exists to improve State inspection programs". H.R. Rep. 653, 90th Cong., 1st Sess. 5 (1967).<sup>12</sup> To be sure, the states' police power over meat products prepared and distributed solely in *intrastate* commerce was theoretically left intact in the sense that Congress did not in one fell swoop displace that power. But Congress did subject the states' exercise of that power to the scrutiny of the Secretary and provide for federal take-over of that function in states whose regulatory requirements were not at least equal to the federal requirements.

In this regard, Dr. F. J. Mulhern, Administrator of the Animal and Plant Health Inspection Service of the Department of Agriculture, in testimony before the Subcommittee on Agriculture of the House Committee on Appropriations on February 26, 1976, stated that:

With California, 17 states have yielded their meat inspection program to us. There is no incentive for them to stay in, because the State legislature can give up the expense and have Uncle Sam come in and take over. [Hearings before a Subcommittee of the Committee on Appropriations, House of Representatives, 94th Cong., 2nd Sess. (Part 3) 591 (1976).]

<sup>12</sup> It is curious indeed that petitioner would argue that "the framers of the Wholesome Meat Act intended to preserve the responsibilities and functions of the States" (Pet. Br. 43) and, in the same breath, rely on Representative Feighnan's statement made prior to the enactment of the Meat Act, that "A current Department of Agriculture survey of packing and processing facilities in *non-Federal inspected meat plants* shows the existence of appalling conditions." (Pet. Br. 42, n. 34; emphasis added). Would petitioner have this Court believe that this statement was anything other than a condemnation of the states' exercise of their responsibilities and functions, which, petitioner now tells us, Congress intended to preserve?

Thus, California, as of April 1, 1976 (Id. at 588) surrendered to the Secretary its police power in the area of inspecting meat products prepared in California for distribution solely in California, which inspection of course covered labeling. To the extent that petitioner now seeks to justify his enforcement activities with respect to Rath's bacon (which he undertook in 1971 and which he presumably would undertake in the future should this Court reverse) by emphasizing California's *present* interest in exercising its police power over meat products, such justification simply cannot be reconciled with California's intentional withdrawal from the field of meat inspection.

Further, petitioner's suggestion that, if this Court were to affirm the Ninth Circuit's finding of federal preemption here as to the labeling of meat products prepared under federal inspection it would somehow do violence to a historical function of the states, is fatuous. The fact of the matter is that federal regulation of the labeling of meat products, such as Rath's bacon, distributed in interstate commerce is not of recent vintage. For as noted in S. Rep. 799, 2 1967 U.S. Code Cong. and Admin. News 2198: "Extensive control has been exercised for many years under regulations adopted pursuant to the Meat Inspection Act [of 1907] and related laws over the marking, labeling, and packaging of products at federally inspected meat packing establishments." In view of this historical reality, §678 of the Meat Act merely provided an express statutory basis for federal preemption in the area of labeling, which preemption had already been effected as a practical matter.

Finally, in his effort to obviate §678 and the overall thrust of the regulatory scheme embodied in the Meat Act, petitioner asserts that there is little federal weights and measures inspection and even less enforcement (Pet. Br. 7). As far as meat products prepared under federal inspection are concerned, this simply is not so. In meat packing plants subject to federal inspection, such as Rath's, inspection is



required during all periods of operation.<sup>13</sup> Meat products cannot lawfully be shipped in interstate commerce unless first inspected and passed by the Secretary, just as labels on such products cannot be used until approved by the Secretary. The inspection by the Secretary, as shown by the record here (R.T. 53), includes inspection of the accuracy of statements of net weight. Thus, for petitioner even to imply that his actions with respect to Rath's bacon at issue here were necessary because of deficiencies in federal meat inspection in any respect is an utter distortion of fact.

In sum, petitioner's argument that there is no federal preemption of state regulation of the labeling of meat products prepared in federally inspected establishments are without merit, for to find any merit in those arguments effectively would erase §678 from the books. We now turn to the questions whether petitioner has imposed labeling requirements in addition to, or different than, the federal requirements and whether petitioner's actions here were pursuant to California's exercise of concurrent jurisdiction consistent with the federal labeling requirements.

II. CALIFORNIA'S LABELING REQUIREMENTS INVOLVED HERE ARE PREEMPTED BY SECTION 678 AND THEREFORE PETITIONER'S ENFORCEMENT THEREOF AS TO RATH'S BACON WAS PROPERLY ENJOINED.

**A California's Labeling Requirements Imposed By Petitioner On Rath's Bacon Are "In Addition To, Or Different Than," The Federal Requirements.**

That California's labeling requirements applied by petitioner to Rath's bacon are in addition to, or different than, the federal requirements is manifest from the face of the respective California and federal requirements. As

<sup>13</sup> The Secretary is *required* to inspect slaughter and processing operations in federally inspected establishments "during the nighttime as well as during the daytime." 21 U.S.C. §609.

noted above, the *statutory* federal labeling requirement applicable here is §601(n) (5). The "reasonable variations" between stated weight and actual weight referred to in §601(n) (5) have been prescribed by the Secretary in 9 C.F.R. §317.2(h) (2). This regulation provides in pertinent part that:

Reasonable variations caused by loss or gain of moisture during the course of good distribution practices or by unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large.

Thus, under the federal labeling requirements, a meat product is *not* deemed to be "misbranded" unless particular variations between the stated weight and actual weight (a) were caused by something other than a loss (or gain) of moisture and, if caused by a loss (or gain) of moisture, it occurred other than during good distribution practices; or (b) were caused by something other than unavoidable deviations from good manufacturing practice; and (c) such variations so caused were not unreasonably large. It should be noted that this administrative refinement of the term "misbranded" applies to meat product after it has left a federally inspected establishment (*i.e.*, during the course of distribution), thus making it clear, as does §678 itself, that the *federal* labeling requirements are applicable to meat products throughout the chain of distribution, including the point of retail sale. And it is also clear that 9 C.F.R. §317.2(h) (2) is a "labeling requirement" within the meaning of §678 inasmuch as a regulation, called for by the regulatory statute itself (by §601(n) (5) here), has the force of law. *United States v. Mersky*, 361 U.S. 431, 437-438 (1960); *Atchison, Topeka and Santa Fe Railway Company v. Scarlett*, 300 U.S. 471, 474 (1937).



The substantive labeling requirement which petitioner applied to Rath's bacon (§12211) provides in pertinent part that: "Whenever a lot or package of any commodity is found to contain, through the procedures authorized herein, a less amount than that represented, the sealer shall in writing order same off sale . . ." In order for this Court to conclude, as did the lower courts, that petitioner was imposing on Rath's bacon a labeling requirement *different than* the federal requirement nothing more than a comparison of §601(n) (5) of the Meat Act and §12211 is needed. In the first place, petitioner was not applying, as demanded by §678, the precise labeling requirement incorporated in the definition of misbranded set forth in §601(n) (5). Nor was he applying a labeling requirement which *in substance* was the same as the federal requirement. For §12211 makes no reference whatever to "reasonable variations" as does §601(n)(5), and affords no recognition to such variations in the circumstances specified in 9 C.F.R. §317.2(h) (2). As aptly observed by the District Court, petitioner does "not, in any sense of the word, pretend to be applying federal statutory standards" (Jones Pet. App. 67, 357 F. Supp. at 535).

Petitioner of course seeks to justify his enforcement actions at issue here by asserting that the weight testing procedure underlying his off sale orders pursuant to §12211 does permit reasonable variations between stated weight and actual weight. That procedure (set forth in Article 5, §2933.3 of the California regulations), as noted by the Court of Appeals, involves a twelve-step method, as follows:

- (1) determine the number of packages in the lot to be sampled;
- (2) from a table in the regulation, determine the total package sample size (e.g., 15 packages out of a lot of 300);
- (3) from the same table, determine the tare sample size (e.g., 2 packages out of a lot of 300);

(4) record the gross weight of each tare sample package;

(5) remove the usable contents from each tare sample, weigh the used, empty container, and compute the average rate weight;

(6) weigh the remaining packages in the package sample and record their weights, determining the amount of error from labeled weight for each package;

(7) [not applicable to bacon];

(8) calculate the preliminary total error for the sample, and determine the arithmetical average error;

(9) calculate the range of error for each sub-group of the package sample;

(10) determine whether any unreasonable errors exist, and eliminate from further computations all samples whose errors exceed the preliminary average error in underweight situations by more than the amounts set forth in tables in the regulations; if the number of unreasonable errors exceeds a certain set figure for each sample size, further action, including the issuance off-sale orders, may be undertaken;

(11) recalculate the total and average error of the sample excluding the unreasonable errors;

(12) "(a) If the total error as obtained from the sample is plus and is less than the value shown in Table III for the corresponding range and sample size, then a shortage may or may not exist, and additional samples may or may not be taken, depending upon the discretion of the weights and measures official. If no additional samples are taken then the procedures as set forth in the following sections shall govern the disposition of the lot.

"(b) If the total error obtained from the sample is less than the above-determined value, and the error is

minus, then a shortage may or may not exist, and additional samples may or may not be taken, depending upon the discretion of the weights and measures official. If no additional samples are taken the lot shall be passed. If additional samples are taken then the procedures as set forth in the following sections shall govern the disposition of the lot."

Like §12211, Article 5 makes no reference to "reasonable variations" and, moreover, does not incorporate the specific recognition of moisture loss during good distribution practices as required by 9 C.F.R. §317.2(h) (2).<sup>14</sup> Nor, as shown at the trial of Rath's action against Becker (petitioner's counterpart in Los Angeles County), do the county departments, as a practical matter recognize variations in net weight which result from moisture loss during good distribution practice (Jones Pet. App. 6, 530 F.2d at 1300).

It is thus inescapable that petitioner, in ordering Rath's bacon off sale, was not applying the federal definition of "misbranded", either pursuant to a California statute, a California regulation, or as a matter of practice. Petitioner therefore was imposing on Rath's bacon a state labeling requirement different than the federal labeling requirement and, for this reason the District Court enjoined petitioner's enforcement actions as to Rath's bacon and the Court of Appeals affirmed.

<sup>14</sup> Likewise, petitioner's reliance on Handbook 67 of the National Bureau of Standards (Br. 22-26) is misplaced. The statistical testing methods set forth therein, with which Article 5 in fact does not conform, are not material to petitioner's enforcement actions as to Rath's bacon inasmuch as those actions were taken pursuant to California's substantive labeling requirements which are different from §601(n) (5) and 9 C.F.R. §317.2(h) (2).

### **B. Petitioner's Purported Exercise Of Concurrent Jurisdiction Under §678 Was Inconsistent With The Federal Labeling Requirements**

Since petitioner was applying a substantive California labeling requirement which clearly was different than the federal requirement, his purported exercise of concurrent enforcement jurisdiction necessarily cannot be considered "consistent" with the federal labeling requirements. In other words, petitioner's enforcement actions here are preempted because they transgress the threshold restriction embodied in §678 — the prohibition against the states' imposing a labeling requirement different than the federal requirement with respect to a product prepared in a federally inspected establishment. It therefore must follow that petitioner's purported exercise of concurrent jurisdiction under §678 was *inconsistent* with the federal labeling requirements and plainly contravened §678.

Because we believe that the question presented here should be resolved, as it was by the District Court and the Court of Appeals, on the basis of the application of the preemptive language in §678 to the facts of this case, case law would appear to be of little import. However, this case is not the first occasion on which a Court of Appeals (or for that matter this Court) has been called upon to construe and apply §678. The first occasion was in *Armour v. Ball*, 468 F.2d 76 (6th Cir. 1972), *cert. denied*, 411 U.S. 981 (1972), a case which, understandably, petitioner failed to cite in his brief.

In the *Armour* case, plaintiffs, concerns engaged in the preparation of sausage products in federally inspected establishments, brought suit for injunctive and declaratory relief against the enforcement of certain provisions of the Michigan Comminuted Meat Law and regulations promulgated pursuant thereto relative to requirements for the meat byproduct, protein, water and binder content of sausage products, and the labeling of sausage products. In

that action, as here, plaintiffs invoked §678. In reversing the District Court, the Sixth Circuit declared the Michigan requirements unenforceable as "in addition to, or different than" the federal requirements, noting that "... in view of its unambiguous language, Section 408 [§678] reflects unequivocal legislative purpose to make the Federal Act preemptive." 468 F.2d at 84. Further, the Court squarely rejected Michigan's argument that the federal requirements were only *minimum* requirements and that the states were free to enact more stringent requirements. While the *Armour* case did not involve weight labeling, the Sixth Circuit's reading of §678 is equally applicable here, as indeed is reflected by the Ninth Circuit's decision here.

#### CONCLUSION

For the foregoing reasons, and specifically to the end that the intent of Congress to promote uniform national labeling requirements will not be thwarted and that undue burdens not be placed on interstate commerce, the National Independent Meat Packers Association as *amicus curiae* respectfully urges this Court to affirm the judgment of the Court of Appeals for the Ninth Circuit pertaining to The Rath Packing Company.

Respectfully submitted,

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**SUPPLEMENTAL APPENDIX**

Findings of Fact and Conclusions of Law  
In Iowa Beef Processors, Inc., v. Carbaugh,  
Civil Action No. 608-74-A  
(E.D.Va., November 27, 1974)

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**FINDINGS OF FACT**

The facts in this case are not in dispute, and the Court finds them to be as follows:

Plaintiff, Iowa Beef Processors, Inc., is a corporation engaged in the slaughter of livestock and the sale of meat products in interstate commerce. As such, plaintiff is subject to the provisions of the federal Wholesome Meat Act of 1967 (21 U.S.C. §601, *et seq.*).

Defendant is the Commissioner of the Department of Agriculture and Commerce of the Commonwealth of Virginia. As such, defendant is vested with authority to enforce the provisions of the Virginia Food Act (Va. Code Ann. §3.1-386, *et seq.*) and any regulations promulgated thereunder.

On November 30, 1973, plaintiff obtained from the United States Department of Agriculture final approval<sup>1</sup> of a label to be used on one-pound, three-pound and five-pound packages of a product consisting of beef, water, textured vegetable protein, seasonings, and preservatives (hereafter "the product") bearing the title "Beef and Hydrated Textured Vegetable Protein." The product is in bulk form, i.e., not in the shape of patties or any other

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<sup>1</sup> A federal regulation provides that no label shall be used on any product manufactured in a federally inspected meat packing establishment until the label has been approved by the Administrator of the Consumer and Marketing Service of the Department of Agriculture. 9 C.F.R. § 317.4 (Revised January 1, 1974).

shape immediately usable by consumers. The label approved by the Department of Agriculture included a depiction, entitled "Serving Suggestion," of one use of the product as patties for barbecue grilling. A legend on the label stated that "Additional uses are Meat Loaf, Meat Balls, Meat Sauces, Casseroles." Subsequent to November 30, 1973, plaintiff shipped the product bearing the aforesaid label to customers in various states, including customers in the Commonwealth of Virginia.

In a letter dated June 7, 1974, an agent of defendant, Mr. Don O'Connell, assistant Supervisor, Food Inspection, advised plaintiff that:

In reviewing the label of this product, we find that its ingredients are those of a beef pattie mix as defined in the Virginia Ground Beef Regulations. Therefore, the absence of the term "Beef Pattie Mix" on the product's labeling renders it misbranded and in violation of the Virginia Food Laws.

Mr. O'Connell further stated in this letter that "We trust you will take steps to correct this violation and that no further action will be necessary to obtain compliance with the Virginia Food Laws." A copy of this letter was sent to the customer of plaintiff from which defendant's agents had obtained a sample of the product.

In a letter dated July 12, 1974, an agent of defendant, Mr. Ray Vanhuss, Supervisor, Food Inspection, advised plaintiff as follows:

After serious consideration, it is our judgment that your product meets the Virginia standard of identity for beef patties and should be labeled in compliance with this standard. These regulations and federal regulations specifically establish a standard of identity for this product. Therefore, we do not believe it is within our authority to deviate from these regulations.

If the product is in bulk form, it should be labeled as "Beef Pattie Mix" with the ingredients listed by the common or usual name in descending order of predominance. If it is shaped in the form of a pattie, it should be labeled as "Beef Patties" followed by a list of ingredients as specified for beef pattie mix.

In subsequent letters to certain of plaintiff's customers in the Commonwealth of Virginia, defendant's agent O'Connell advised these customers that the product was misbranded<sup>2</sup> in violation of the Virginia Food Laws and therefore was subject to seizure.

In a letter dated September 25, 1974, defendant's agent Vanhuss advised plaintiff that:

Upon very careful evaluation of all the data available to us at this time, we must conclude that the Virginia Food Laws and its regulations are prevailing and that your current labeling is in violation. Consequently, we are advising you that any quantities of beef products under its current label received in this State after October 7, 1974 will be placed under seizure.

The "data available" referred to above included a letter dated September 20, 1974 from Harold M. Carter, Esquire, Director, Regulatory Division, Office of the General Counsel, United States Department of Agriculture, to John Purcell, Esquire, Assistant Attorney General of the Commonwealth of Virginia. The pertinent portions of Mr. Carter's letter are extracted below:

\*\*\*

<sup>2</sup> None of the letters directed by defendant's agents to plaintiff or to plaintiff's customers referred to any specific subsection of Section 3.1-396 of the Virginia Code under which defendant deemed the product "misbranded." However, counsel for plaintiff in oral argument indicated that defendant was relying upon subsection 3.1-396(g), the counterpart of 21 U.S.C. § 601(n)(7).

Section 319.15(c) of the meat inspection regulations (9 C.F.R. 319.15(c)) under the Act establishes a standard of composition for products labeled "Beef Patties." The standard provides that beef patties shall consist of chopped fresh and/or frozen beef with or without the addition of beef fat as such and/or seasonings, and does not specify a minimum beef content. These products can contain extenders, binders, and partially defatted beef fatty tissue, without added water or with added water only in amounts such that the product's characteristics are essentially that of a meat pattie.

\* \* \*

. . . . Such products [ground meat with hydrated textured vegetable protein added] if in pattie form, comply with the "beef patties" standard as it does not contain a maximum limit on non-meat ingredients other than added water. However, there is no standard specifically applicable to a beef pattie mix not in pattie form.

\* \* \*

The Act and the regulations (section 317.2(c)(1)) require a product to be labeled with the name cited in its standard or by a common or usual name in the absence of a specific standard, or if names of this kind do not exist, then a descriptive designation must be used for label identification purposes. The term "Beef and Hydrated Textured Vegetable Protein" was approved by the administrative officials for this purpose.

As a result of the foregoing actions of defendant's agents, plaintiff's customers for the product removed it from display in their stores and refrained from purchasing further supplies of the product. On October 2, 1974, plaintiff commenced this action seeking an injunction prohibiting defendant from seizing, threatening to seize, or otherwise inhibiting the sale of the product in the Commonwealth of

Virginia on the ground that it was misbranded under the Virginia Food Act.

## CONCLUSIONS OF LAW

1. The absence of the term "Beef Pattie Mix" on the label of the product does not render the product "misbranded" within the meaning of the federal Wholesome Meat Act of 1967 or the Virginia Food Act inasmuch as the product does not purport to be, nor is it represented as, a product for which a standard of identity or composition has been prescribed by regulation pursuant to either statute. Specifically, the product, although identical in composition to a "Beef Pattie," does not come within the standard for "Beef Patties" prescribed by regulation pursuant to either the federal or the Virginia statute inasmuch as the product's physical characteristics are not "essentially that of a meat pattie" but rather is marketed in bulk form.

2. The Secretary of Agriculture acted in accord with 9 C.F.R. § 317.2(c)(1) in approving, in the absence of a standard of identity or composition applicable to the product, the descriptive title "Beef and Hydrated Textured Vegetable Protein" for the product.

3. By requiring that the label for the product bear the title "Beef Pattie Mix," defendant exceeded his authority in contravention of § 408 of the Wholesome Meat Act (21 U.S.C. § 678) by imposing a marking or labeling requirement "in addition to, or different than" the requirements of the Secretary of Agriculture.

4. This case having been advanced for trial on the merits and consolidated with the hearing on plaintiff's application for preliminary injunction, plaintiff is entitled to a permanent injunction enjoining defendant from seizing, threatening to seize, or otherwise inhibiting the sale of the product in the Commonwealth of Virginia on the ground



that the product should be labeled "Beef Pattie Mix" or "Beef Patties" under the Virginia Food Act. Defendant's motion for summary judgment is denied.

An appropriate Order shall be entered.

/s/ Albert V. Bryan, Jr.  
United States District Judge

Alexandria, Virginia  
November 27th, 1974

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1975

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No. 75-1053  
—

JOSEPH W. JONES, as Director of the County of River-  
side, California, Department of Weights and Measures,  
*Petitioner,*

*v.*

THE RATH PACKING COMPANY, *et al.*, *Respondents.*

—  
ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT  
—

BRIEF FOR GROCERY MANUFACTURERS OF AMERICA, INC.,  
AS AMICUS CURIAE  
—

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July 16, 1976

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1975

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No. 75-1053

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JOSEPH W. JONES, as Director of the County of Riverside, California, Department of Weights and Measures,  
*Petitioner,*

*v.*

THE RATH PACKING COMPANY, *et al.*, *Respondents.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

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BRIEF FOR GROCERY MANUFACTURERS OF AMERICA, INC.,  
AS AMICUS CURIAE

---

Amicus submits this brief in support of the Respondents. All parties have consented to its filing by a letter that has been presented to the Clerk of the Court in accordance with Rule 42(2).

**INTEREST OF AMICUS**

The Grocery Manufacturers of America, Inc., is a trade association representing companies that manufacture food products for nationwide distribution. Its members include the principal grocery manufacturers

in this country. Members of the association ship food in interstate commerce for sale throughout the country and are subjected to numerous different labeling requirements imposed by various jurisdictions, including the requirements at issue in this case.

#### INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns the preemptive effects of three federal statutes—the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 *et seq.*; the Fair Packaging and Labeling Act, 15 U.S.C. § 1451 *et seq.*; and the Federal Meat Inspection Act (as amended by the Wholesome Meat Act), 21 U.S.C. § 601 *et seq.*—on California statutes and regulations governing label declarations of net weight for bacon and flour products.

All aspects of the labeling of foods distributed in interstate commerce—including net weight declarations—are governed by the Federal Food, Drug, and Cosmetic Act and regulations issued under it by the Food and Drug Administration (FDA). In recent years the member companies of the Grocery Manufacturers of America have been confronted with an increasing number of state and local statutes, regulations, and administrative interpretations that impose food labeling requirements different from or in addition to those imposed under federal law. Those requirements often differ from state to state and from locality to locality. Collectively, such state labeling requirements impose substantial barriers to the national distribution of food. Variations in net weight labeling requirements constitute only a single example of the profusion of inconsistent state labeling requirements to which national food distributors are subjected.

This brief addresses the preemptive effect that should be accorded to the Federal Food, Drug, and Cosmetic Act and the FDA regulations. It does not consider the preemptive effect of requirements imposed under the Fair Packaging and Labeling Act and the Wholesome Meat Act; those subjects are dealt with in the brief for the Respondents.

Section 403(e) of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 343(e), requires food labels to bear an “accurate” statement of net weight, but provides for issuance of regulations permitting “reasonable variations.” FDA has issued regulations providing for two kinds of variations from stated net weight: unavoidable deviations in good manufacturing practice and deviations resulting from loss or gain of moisture. 21 C.F.R. § 1.8b(q). No other variations are permitted. Manufacturers may not overfill or underfill their products, except within the limits of deviations in good manufacturing practice.

California statutes and regulations governing the accuracy of net weight declarations for foods and other commodities make no allowance for gain or loss of moisture. Flour, like many foods, is a hygroscopic commodity. Its moisture content (and therefore its weight) depends in part on the humidity of the place where it is being measured. To comply with the California law, manufacturers who expect that their flour may lose moisture in the course of distribution are required to compensate for that projected water loss by a corresponding increase in the flour content of the package, and thus to overpack their products to assure full measure at the point of sale.

This requirement of California law conflicts directly with the corresponding requirements for net contents declarations imposed under the Federal Food, Drug, and Cosmetic Act. Manufacturers shipping flour to California in interstate commerce cannot comply with the state regulation, since overpacking at the point of manufacture violates the federal statute. Because it conflicts irreconcilably with the federal statute, the California law is preempted under the Supremacy Clause of the Federal Constitution.<sup>1</sup>

Moreover, the California requirement impermissibly interferes with the purpose of the federal regulatory scheme. An important function of the federal prohibition against intentional overpacking is to permit price comparisons by consumers among competing products. Such comparisons can be made only if the weights of products cluster (within deviations permitted by the federal regulations) around the stated net weight of the package. If manufacturers deliberately overpack to allow for loss of moisture, the extent of overpacking will vary for each product, depending on differences in the moisture content resulting from variations in humidity in the geographical location where the flour is packed and the geographical area in which it is to be marketed. The actual amount of flour in competing packages in retail stores will therefore vary, even though the declared net contents are the same. Since consumers will be unable to determine accurately the amount of flour in any particular package, they will be unable to make accurate price comparisons.

FDA has solved this problem for flour by issuing a standard of identity that sets a maximum moisture con-

<sup>1</sup> U.S. Const., art. VI, cl. 2.

tent of 15 percent for the food at the time it is packed, thus standardizing on a national basis the amount of flour solids that will be received by all consumers in a given package size regardless of where it is bought at retail. 21 C.F.R. §15.1(a). Any subsequent change in moisture content does not affect the value of the product, since all consumers, wherever located, will receive the same quantity of flour solids. Moreover, since flour is invariably used in combination with water or other liquids, loss of moisture does not affect its quality. The FDA regulatory system fully answers the problem of moisture loss or gain and preserves the federal statutory purpose of permitting value comparisons. The California statute defeats this purpose.

The conflict between California and federal net weight labeling requirements is but one example of the larger problem of state and local food labeling requirements different from or in addition to those imposed by federal law. As applied to foods that are shipped in interstate commerce, those requirements are invalid, since the Federal Food, Drug, and Cosmetic Act and the regulations issued under it preempt different or additional state labeling requirements.

Although the Federal Food, Drug, and Cosmetic Act, which was enacted in 1938, lacks an express preemption provision, its legislative history evidences a continuing congressional concern for the establishment of a uniform national system of food labeling regulation. The modern United States food industry, which distributes its products on a national basis without regard for state boundaries, requires such a labeling system. Numerous authoritative studies conducted by federal investigative commissions, as well as expressions of opinion by the Association of Food and Drug Offi-



cial (the national association of state and local food and drug officials), support a conclusion that state labeling requirements in addition to or different from those imposed under federal law pose serious obstacles to national commerce in food.

The federal government has a preeminent interest in assuring uniformity of food labeling regulations. To accomplish that purpose, Congress and FDA have established a pervasive system of federal regulations of food labeling that leaves no room for supplementation by the states. An important role remains for state regulatory authorities in the enforcement of uniform labeling requirements established under the leadership of the federal government.

#### ARGUMENT

##### I. CALIFORNIA NET WEIGHT LABELING REQUIREMENTS DIRECTLY CONFLICT WITH REQUIREMENTS IMPOSED UNDER THE FEDERAL FOOD, DRUG, AND COSMETIC ACT.

Manufacturers shipping flour in interstate commerce for sale in California confront conflicting federal and state labeling requirements. The Federal Food, Drug, and Cosmetic Act requires the label for a food to bear an "accurate statement of the quantity of the contents in terms of weight . . . ." but provides that "reasonable variations shall be permitted" by regulations prescribed by the Secretary of Health, Education, and Welfare. 21 U.S.C. § 343(e). The Commissioner of Food and Drugs (to whom authority to administer the Act has been delegated, 21 C.F.R. § 2.120(a)(1)) has promulgated regulations that provide for two types of variations from stated weight: (1) deviations resulting from "loss or gain of moisture during the course of good distribution practice," and (2) "unavoidable deviations in good manufacturing practice." 21 C.F.R.

§ 1.8b(q). With these exceptions, federal law requires that the statement of weight on a label be an accurate statement of the quantity of contents. Neither overfilling nor underfilling is permitted (except to the extent that it may result from an "unavoidable deviation" from good manufacturing practice). Cf. *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 82 (1932).

Section 12211 of the California Business and Professions Code, which authorizes inspectors to order misbranded commodities "off sale," provides:

" . . . the average weight or measure of the packages or containers in a lot of any such commodity sampled shall not be less, at the time of sale or offer for sale, than the net weight or measure stated upon the package . . . ." Calif. Bus. & Prof. Code § 12211 (1976 Supp.).

The implementing regulations are contained in 4 Calif. Admin. Code 8, subch. 2. Petitioner's brief contends that these regulations are based on National Bureau of Standards Handbook No. 67, a manual that weights and measures officials may use in checking the accuracy of quantity declarations for prepackaged commodities of all kinds. Unlike Handbook 67 and the regulations adopted by FDA, however, the California regulations make no allowance for gain or loss of moisture during the course of good distribution practice.<sup>2</sup>

<sup>2</sup> Handbook 67 makes reference to a model regulation for prepackaged commodities adopted by the National Conference on Weights and Measures. That regulation sets out a statistical sampling procedure that allows for variations in stated net weight resulting from deviations in good manufacturing practice. But it also provides that "variations from the stated weight or measure shall

These state and federal standards irreconcilably conflict. Flour is a hygroscopic commodity. Its moisture level—and therefore its weight—depends in part on the humidity of the place where it is measured. *General Mills, Inc. v. Jones*, 530 F.2d 1317, 1320 (9th Cir. 1975). To comply at the retail level with the California standards, millers would be required either to pack flour separately for distribution in California (and other states that may follow suit) or to overpack all their flour packages. Overpacking, however, would be inconsistent with the requirement of federal law that the net quantity statement be “accurate” except insofar as variations are permitted by federal regulations.

In *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), the Court stated:

“A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce . . . .” (Citations omitted.)

The divergent standards of federal and state law in this case confront flour distributors with such a physi-

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be permitted when caused by ordinary and customary exposure . . . to conditions which normally occur in good distribution practice and which unavoidably result in change of weight or measure.” The Handbook explains that “[c]ertain packaged products distributed through the normal packer-to-distributor-to-retailer channel are subject to gain or loss of weight through the increase or decrease in moisture content, beginning immediately after the packaging occurs.” It advises weights and measures officials to “learn to compare various environments and various systems of distribution and storage” in order to make proper allowances. *Checking Prepackaged Commodities: A Manual for Weights and Measures Officials* 2 (Nat’l Bureau of Stnds Handbook 67, 1959).

cal impossibility. For this reason, Section 12211 of the California Business and Professions Code and the regulations implementing it are invalid.

## II. THE CALIFORNIA LABELING REQUIREMENTS INTERFERE WITH THE PURPOSE OF FEDERAL REGULATIONS.

Under the California regulatory scheme, a miller that distributes its products nationwide must pack its flour to allow for moisture change in distribution. Moisture change will vary, depending on the humidity of the place where the flour is packed and the humidity of the region to which it is shipped for retail sale. If flour is packed in a humid climate (such as northern Washington State) and shipped to a dry region (such as Arizona or, to a lesser extent, southern California), moisture loss may be at least 1 ounce per pound of flour. If flour is packed in a dry climate and shipped to a humid region, moisture gain will be correspondingly large. There are, of course, an infinite number of possible moisture changes resulting from national distribution of flour from various packing plants.

To assure that its products meet requirements like those imposed by California, a national flour distributor must follow either of two alternative packing procedures. First, it may segregate the flour packages that will be shipped to those dry regions where the moisture level can be expected to fall below the national standard of 15 percent promulgated by FDA and include sufficient extra flour in the packages for each of those regions beyond that required to meet the FDA standard in order to meet each of the additional requirements of those regions. Second, it may pack all of its flour to comply with the requirements of the driest region in the nation, with the result that the



great bulk of its flour packages will be substantially overpacked at retail.<sup>3</sup>

The first alternative is economically unfeasible for national flour marketers. Large-scale production and distribution processes can be disrupted for selective overfilling only at prohibitive cost.

The second alternative produces an inconsistency of measure at retail in humid localities between locally and nationally distributed flour products. Since products distributed locally in humid areas need not be overpacked to allow for moisture loss, their packages will contain less flour than those of their nationally distributed competitors. The differences in measure will be significant. Under the national standard promulgated by FDA, 21 C.F.R. § 15.1, flour may contain up to 15 percent moisture by weight. The flour packages at issue in this case contained 13–14 percent moisture at the time they were packed. Moisture loss may account for 5–6 percent or more of the packed weight of flour in dry regions. To assure full stated weight at retail in dry regions, the national miller will be required to overpack by 1 ounce or more per pound. In humid regions, nationally distributed products may therefore contain 1 ounce more flour per pound than locally distributed products.

An important objective of the federal scheme governing net weight labeling is to facilitate price comparisons by consumers. This purpose of FDA's regulatory scheme was explained in the Brief of the United

<sup>3</sup> A third alternative, of course, would be for the national marketers to avoid distributing their flour in dry regions. Such results frequently occur when local jurisdictions impose burdensome labeling requirements on nationally distributed food products that are already labeled in full compliance with federal law.

States as Amicus Curiae in *General Mills, Inc. v. Jones*, 530 F.2d 1317 (9th Cir. 1975) at 12. FDA's objective is consistent with the mandate imposed on it by the Fair Packaging and Labeling Act, 15 U.S.C. §§ 1451–1461, which was enacted in part "to promote packaging practices which facilitate price comparisons by consumers." S. Rep. No. 1186, 89th Cong., 2d Sess. 1 (1966). To make price comparisons, consumers must be able to determine the actual net contents of competing products.

FDA has recognized and dealt with the problem of moisture change through the establishment of standards of identity for flour products that set a maximum moisture content of 15 percent at the time the product is packed and labeled. 21 C.F.R. § 15.1(a). A subsequent loss of moisture does not affect the nutritive value of the flour, nor does it affect its usefulness in the home (since flour is invariably used in combination with water, milk, or other liquids). Consumers pay for and receive the same quantity of flour, as defined by the federal standard, even though some part of its moisture content may have evaporated. Since all packages are similarly packed, accurate price comparisons are possible.

The California regulatory requirements defeat the purpose of the FDA regulatory scheme. Consumers in humid areas comparing local and national flour products cannot accurately determine comparative unit prices. The California law thus "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" and is invalid. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Perez v. Campbell*, 402 U.S. 637, 649 (1971). See also *Nash v.*



*Florida Industrial Commission*, 389 U.S. 235, 239 (1967).

The California scheme, moreover, imposes a significant burden on interstate commerce in flour. It places nationally distributed products at a serious disadvantage against locally produced foods in humid areas, since packages of nationally distributed products must contain more flour than locally distributed products whose labels bear the same net weight declarations. See *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959).<sup>4</sup>

The burdens imposed by the California statute on interstate commerce in flour and on the accomplishment of the purposes of federal law cannot be justified by the need to protect the state's consumers against fraud or deceptive practices. To the extent that variations in net weight result from moisture loss, rather than a reduction in flour solids, consumers lose nothing of value.

The California officials contend, however, that they cannot determine whether moisture loss is in fact the cause of apparent shortages in weight detected at the retail level. They suggest that making allowances for

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<sup>4</sup> The discriminatory effect of the California scheme on national flour distributors becomes apparent when one considers the amounts of money that may be involved. Domestic sales of "family flour" and cake flour in 1974 totaled over \$513 million. *Supermarketing*, Sept. 1975, at 50. If only half of that total was distributed on a national basis, the cost to national millers of overpacking as little as 5 percent would have been \$12.8 million. That cost would either have been reflected in higher prices for nationally distributed flours (which would have placed them at a competitive disadvantage against local millers) or in reduced margins of profit for national distributors.

different rates of moisture loss for foods would pose an insuperable obstacle to effective enforcement of their labeling requirements. In fact, however, at least three methods exist for protecting consumers within the state against actual short-weight packages without defeating the policies of federal law. First, state officials in California may establish cooperative programs with officials in other states to inspect flour and similar foods at the point of packaging to assure that the stated net weight is packed. Second, state officials can determine the moisture content for a commodity offered at retail, compare it with the moisture content permitted under applicable federal standards, and calculate the portion of weight deviation that is accounted for by moisture loss. Finally, the state officials can follow the advice of National Bureau of Standards Handbook 67 (which, according to Petitioner's Brief (at 19), forms the basis for California's enforcement program) and "learn to compare various environments and various systems of distribution and storage" and "develop procedures for conducting a sound investigation that will result in the building up of a working knowledge as to what is 'customary exposure' and what may be considered to be 'good distribution practice' with respect to the packages of an individual commodity that may gain or lose weight through gain or loss of moisture." *Checking Prepackaged Commodities: A Handbook for Weights and Measures Officials* 2-3 (Nat'l Bureau of Stnds Handbook 67, 1959). In short, the inspector must do his homework and cannot rely on a rigid statistical procedure that does not reflect the realities of proper nationwide food distribution.

III. THE FEDERAL FOOD, DRUG, AND COSMETIC ACT AND REGULATIONS  
ISSUED UNDER IT PREEMPT STATE FOOD LABELING REGULATIONS IN  
ADDITION TO THOSE IMPOSED UNDER FEDERAL LAW.

The legislative history of the Federal Food, Drug, and Cosmetic Act and the nature of modern food distribution and marketing practices evidence a substantial national interest in establishing a uniform system of rules to govern food labeling. That interest has been served by the establishment of a pervasive system of federal regulation which, while permitting concurrent federal-state enforcement, does not leave room for the establishment of different or additional state labeling requirements for foods that are shipped in interstate commerce.

Although the Federal Food, Drug, and Cosmetic Act contains no provision expressly preempting state labeling requirements different from or in addition to those imposed under federal law, the absence of such a provision is not dispositive of the question of preemption. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973); *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 772 (1947). Statutes to which this Court has accorded preemptive effect have often not contained such provisions. The Court has made clear that preemptive intent may be inferred from the legislative history of a statute, the need for a uniform system of federal regulation, or the existence of a pervasive system of federal rules that permits no supplementation by the states. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Under the criteria identified by this Court in numerous decisions, preemptive effect should be accorded to the system of labeling regulation established under the Federal Food, Drug, and Cosmetic Act.

A. The National Interest in Uniform Labeling Requirements for  
Foods Shipped in Interstate Commerce Can Only Be Served  
by a Single System of Federal Regulation.

The regulation of food labeling comprises two separate functions—the development of rules and policies governing labeling, and the monitoring and enforcement of compliance with those policies. The Grocery Manufacturers of America agrees with Petitioner that state and federal authorities should work cooperatively to perform the monitoring and enforcement function. That function is a legitimate exercise of the state's police power. But the establishment of uniform rules to govern the labeling of foods that are distributed nationally and regionally in interstate commerce is a matter of peculiarly national concern. The regulation of interstate food distribution can only be effectively accomplished under a single national statutory scheme. Imposition of varying requirements by the states frustrates that federal scheme.<sup>5</sup>

<sup>5</sup> Food regulatory officials perform many functions other than issuance of labeling and compositional requirements and enforcement of compliance with them. Many of these functions can (and should) be performed by state and local authorities. Effective surveillance of sanitation in food manufacturing plants, warehouses, and similar facilities requires the cooperative efforts of state and federal officials; their concurrent regulation of such matters does not undercut the federal interest in efficient national food distribution. Sanitation in food stores and restaurants is a matter of peculiarly local concern. Similarly, state and local officials should bear principal responsibility for devising and enforcing regulations to protect consumers from fraud or deception in the sale of foods (such as some meats, cheeses, and fresh fruits and vegetables) that are not shipped in interstate commerce in prepackaged form but are packaged and weighed at the retail level. *See Austern, Federalism in Consumer Protection: Conflict or Coordination?* 29 AFDOUS Quart. Bull. 148 (1965).



This Court has often recognized that federal preemption of state regulation will be implied when the subject matter demands exclusive federal regulation in order to achieve "uniformity vital to federal interests." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 144 (1963); *Campbell v. Hussey*, 368 U.S. 297, 300-302 (1961); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 241-244 (1959); *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 167-168 (1942).

When Congress enacted the first national food law—the Food and Drugs Act of 1906 (Act of June 30, 1906, ch. 3915, 34 Stat. 768)—it recognized the burdens that inconsistent state requirements could impose on interstate commerce, and sought to encourage the adoption of uniform requirements. The Report of the House Committee on Interstate and Foreign Commerce that accompanied the 1906 Act stated that

"... the laws and regulations of the different States are diverse, confusing, and often contradictory. What one State now requires the adjoining State may forbid. Our food products are not raised principally in the States of their consumption.

"State boundary lines are unknown in our commerce, except by reason of local regulations and laws, such as State pure-food laws. It is desirable, as far as possible, that the commerce between the States be unhindered. . . ." H.R. Rep. No. 2118, 59th Cong., 1st Sess. 5-6 (1906).

The 1906 Act, however, did not establish the basis for a comprehensive federal labeling scheme; it left many aspects of food labeling to the states. See pp. 28-29, below.

Between 1906 and 1938, the national system of food manufacturing and marketing changed dramatically, and the change increased the federal interest in uniform regulation. Consumption of fresh foods and unprocessed agricultural products declined, and greater quantities of processed, prepared, or manufactured foods were purchased. Advances in transportation facilities and distribution technology (such as the introduction of refrigerated vehicles) encouraged the growth of large-scale food manufacturing firms that distributed their products on a national basis. See Federal Trade Commission, *The Structure of Food Manufacturing* 5 (Nat'l Comm'n on Food Mktg. Tech. Study No. 8, June 1966). Varying or inconsistent state food labeling requirements created increasingly serious barriers to national food distribution. See, e.g., U.S. Dept. of Agriculture, *Barriers to Internal Trade in Farm Products* (1939). When Congress considered enactment of a new national food and drug law in the 1930's it acknowledged the "problem of uniformity" and recognized the need for the "Federal Government to take leadership in modernizing existing law." S. Rep. No. 361, 74th Cong., 1st Sess. 3 (1935). The statute that Congress enacted in 1938 provided the framework for a comprehensive federal system of food labeling regulations.

The problem of varying and inconsistent state regulations has, however, worsened with the passage of time. Unfortunately, inconsistencies in state labeling requirements are as common today as they were in 1938. The National Commission on Food Marketing, established by Congress in 1964\* to appraise the marketing structure of the industry, concluded that

\* Pub. L. 88-354, 88 Stat. 269 (1964).



"The conflicts among the profusion of State regulations bearing on containers, grades, labels, product nomenclature, and the like are a significant burden on interstate trade in food products.

*"We therefore believe that a concerted effort should be made to effect uniformity among State regulations that obstruct trade in foods across State lines." Food from Farmer to Consumer: Report of the National Commission on Food Marketing 112 (1966) (emphasis in original).*

In 1963, FDA contracted with the Public Administration Service to conduct a study of state and local food and drug programs. The Service's report, published in 1965, concluded:

"... The general food and drug laws of the states fail to reveal a basic uniformity among themselves or an adequate correspondence with federal legislation. In many instances they do not have the breadth of coverage of products and consumer risks they should possess. Differences in laws and regulations are excessive, and many serve no useful purpose; the total body of state and local food and drug laws is a confusing and disjointed mass." Public Administration Service, *A Study of State and Local Food and Drug Programs* 8 (1965).

In 1969, the President appointed the White House Conference on Food, Nutrition, and Health to study the nation's nutrition problems and consider government policies that would promote the availability of nutritious foods. The Conference studied the problems of developing and distributing nutritious new foods under federal and state regulatory policies. Its Report concluded:

"... Under present Federal, State and local law, different and often inconsistent regulatory requirements for the sanitation, labeling and marketing of new foods prevail throughout the Nation. These inconsistent and different requirements result in artificial trade barriers that impede the orderly marketing of foods, hinder sound nutrition, raise the cost of new foods to consumers, and directly interfere with the public interest. Other restrictive laws and regulations have hindered the development of new foods regardless of higher nutritional value and lower cost to consumers. Some of these laws also have had the unexpected effect of preventing the adaptation of traditional foods to modern food technology and nutritional needs. This situation cannot be justified on public health grounds, and reflects the lack of any attempt to establish and maintain a national policy on foods that reflects the interests of consumers." *Report of the White House Conference on Food, Nutrition and Health* 124-125 (1969).

Accordingly, that Report recommended, at 117, "Uniform application of all regulatory requirements throughout the Nation, enforceable by Federal, State, and local officials."

This lack of uniformity, and the burden it places on legitimate commerce in foods, has been repeatedly recognized by the Association of Food and Drug Officials (formerly the Association of Food and Drug Officials of the United States), whose membership includes regulatory officials from all of the states. In 1941, for example, the Association's president criticized "trade barriers that force many producers and manufacturers to live under the virtual dictatorship of localized bureaucracy" and urged state food and drug officials to "[d]iscourage the enactment of laws

that make it impossible for legitimate industry of one state to engage in trade in another under conditions which are fair and equitable." 5 AFDOUS Quart. Bull. 2 (1941). That year, the Association's members adopted a resolution expressing "disapproval of the tendency toward the enactment of legislation which constitutes definite barriers to Commerce between the states. . . ." 5 AFDOUS Quart. Bull. 8 (1941). Since 1940, the Association has repeatedly adopted resolutions urging enactment of uniform food and drug legislation. *E.g.*, 4 AFDOUS Quart. Bull. 3-4 (1940); 31 AFDOUS Quart. Bull. 73 (1967); 33 AFDOUS Quart. Bull. 46-47 (1969). Nonetheless, as recently as 1973, the Association's members passed a resolution acknowledging (and disapproving) "a growing trend that . . . some States and local agencies are passing laws, regulations, or ordinances which are inconsistent with the principle of uniformity to which A.F.D.O. U.S. is committed. . . ." 37 AFDOUS Quart. Bull. 19 (1973).<sup>1</sup>

Numerous examples of varying and inconsistent state food labeling requirements may be cited. Perhaps the most serious burdens on national food distri-

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<sup>1</sup> The solution that state food and drug officials have regularly urged for the problem of inconsistent state requirements is adoption of uniform state legislation. In fact, a uniform statute, developed by the Association of Food and Drug Officials in cooperation with FDA, has been enacted in many states. It has not, however, solved the problem of inconsistent state requirements. In many states, the uniform act has been adopted in addition to, not in place of, special labeling requirements enacted over the years. Moreover, the broad terms of the uniform act leave state regulatory officials great discretion to impose inconsistent requirements in particular cases, and inconsistent regulatory policies remain quite common. See Public Administration Service, *A Study of State and Local Food and Drug Programs* 47-48 (1965).

bution are imposed by conflicts among the states and between the states and the federal government with respect to standards of identity and composition. The Federal Food, Drug, and Cosmetic Act empowers FDA to establish standards of identity that specify the legal names and composition of foods. 21 U.S.C. § 341. An important purpose of these standards is to promote national uniformity and eliminate consumer confusion. Once a food standard is promulgated, all foods that purport to be or are represented as the standardized food must bear the name established by the standard and be formulated in accordance with its requirements. 21 U.S.C. § 343(g). Some states automatically adopt federal standards of identity, but others do not. Many states that adopt federal standards by reference reserve the right to adopt inconsistent standards if their regulatory officials choose to do so. Section 26510 of the California Health and Safety Code states, for example, that ". . . The [California State] department may, by regulation, establish definitions and standards of identity, quality, and fill of container for any food whether or not such definitions and standards are in accordance with the federal regulations, when in its judgment such action will promote honesty and fair dealing in the interest of consumers. . . ." Calif. Health & Safety Code § 26510 (Supp. 1976).

The inconsistencies in labeling requirements that may result from a failure to recognize nationally established standards of identity and other labeling rules are well illustrated by a series of enforcement actions instituted by regulatory officials in New York State last year. In two cases, New York officials sought injunctions against distribution of nationally



marketed foods labeled in conformity with federal standards of identity, arguing that their labeling did not comply with state law. Both cases involved products that were labeled as "table syrup" in accordance with mandatory requirements under 21 C.F.R. § 30.1. New York officials contended that the products should be labeled "imitation maple syrup"—a statement of identity that would violate the requirements of 21 U.S.C. § 343(g), as well as equivalent statutes in states that automatically adopt federal identity standards. *Dyson v. Lever Brothers, Inc.*, (N.Y. Sup. Ct., 3d Dept., complaint served December 10, 1975); *Dyson v. CPC International, Inc.* (N.Y. Sup. Ct., 3d Dept., complaint served December 10, 1975).

Similar problems arise when states adopt special requirements for particular food products. For example, frozen desserts made from vegetable oil (frequently sold under the name "mellorine") are subject to insuperable interstate trade barriers established by a profusion of inconsistent state regulations. States have adopted widely divergent compositional and labeling requirements for these foods, so that a single product cannot possibly be marketed on a national basis. As of January 1, 1974 (the latest date for which a reliable compilation is available), 35 states prohibited some form of mellorine-type frozen desserts. Twenty-seven states prohibited both "regular-fat" and "low-fat" versions of the product. Six states prohibited low-fat products, but permitted regular-fat ones. One state prohibited regular-fat products, but permitted low-fat ones. For regular-fat mellorine, minimum fat requirements ranged from 6 to 10 percent; minimum milk solids not fat from 10

to 20 percent; maximum stabilizer content from 0.5 to 1 percent; and minimum food solids per gallon from 1.3 to 1.6 pounds. Most states that permitted the products required them to be labeled as "mellorine" or "low-fat mellorine." Two states, however, required them to be labeled as "imitation ice cream" or "imitation ice milk." One state required the label name "frozen dessert product." Another forbade use of the term "low-fat" in the labeling for the low-fat product. See *Federal and State Standards for the Composition of Milk Products (and Certain Non-Milkfat Products)* 25 (U.S. Dept. Agriculture Handbook No. 51, 1974).

Numerous other instances of conflicting state labeling requirements may be cited. Many states, for example, require the label for a nondairy cheese substitute to bear the identity statement "imitation cheese" in prominent type. *E.g.*, Iowa Code Ann. § 191.2(3). But Arizona has established a complex system of labeling for these products that permits only "fanciful" or brand names and prohibits label references to "cheese" (except as part of the required ingredient listing). Ariz. Rev. Stat. Ann. §§ 3-626.02, 3-661 *et seq.* Arizona officials, to whom labels for such products must be submitted prior to marketing in the state, will not approve labels that bear the identity statement "imitation cheese."

The multiplicity of state statutory requirements is supplemented by a profusion of administrative regulations issued by state enforcement agencies. Like the statutes on which they are based, these regulations are often inconsistent from state to state. They present a further difficulty to manufacturers because they are often unavailable in authoritative, up-to-date



compilations. Some states (like California) maintain codes of administrative regulations that are more or less current. But many others have no reliable method of disseminating their regulatory issuances. The Public Administration Service, which sought to compile state food and drug regulations over a period of 18 months, concluded that "[i]n some agencies, field work was completed with more than the suspicion that agency filing and other administrative practices were such that no real assurance existed that current regulations had been fully brought together." Public Administration Service, *A Study of State and Local Food and Drug Programs* 65 (1965). This uncertainty concerning state and local food labeling requirements is a serious obstacle to national food distribution. The conscientious national marketer often cannot authoritatively determine whether the labeling for its products is lawful in all jurisdictions. In contrast, federal regulations are readily available to manufacturers through the Federal Register system and the annual issuances of the Code of Federal Regulations.

The additional costs imposed by differing food label requirements, all of which must be borne by consumers in the form of higher food prices, are literally incalculable. To the extent that two or more jurisdictions require different labels, there are of course the direct costs of printing up the additional labels. But the indirect costs—maintaining two or more separate label inventories, imposing separate distribution and record-keeping requirements, and the necessity for entirely different advertising, to name just a few—are far greater. Each minor label change in the future in turn means, as a practical matter, multiple

changes in all of the labels required to be used in each of the various jurisdictions involved. Thus, consumers are paying millions of dollars each year, in the form of higher food prices, as the direct and immediate result of these differing food label requirements.

Nor is there any conceivable consumer benefit that results. At present, every two-pound bag of flour sold in the United States contains the same quantity of flour solids, standardized to the nationwide 15 percent moisture level promulgated by the Food and Drug Administration. Of what possible benefit can it be to consumers if California is permitted to adopt a different rule which requires different manufacturers either substantially to overpack all of the flour they sell in California, or to overpack all of their flour sold in the country (which will make them non-competitive with those local California flour packers who need not overpack in order to meet the California requirements)? How are consumers protected by requiring different names for a food in different states, or banning a food completely from one state in order to protect the local agricultural industry? It is obvious that these are simply distinctions without a difference, imposed for purposes wholly unrelated to the public welfare.

It is undoubtedly true that any of a number of different ways of determining the net contents of a product, or the common or usual name of a food, or the label placement of mandatory information, or similar matters, could be determined to be reasonable, in the abstract. This is not sufficient reason, however, for ten different jurisdictions to adopt ten different requirements in the face of a definitive federal determi-

nation of proper labeling practices under the Federal Food, Drug, and Cosmetic Act.

This Court has recognized the importance of assuring that inconsistent state food laws do not burden legitimate interstate commerce in foods or diminish the rights created under federal law. In *McDermott v. Wisconsin*, 228 U.S. 115, 133-134 (1913), the Court denied to the states the power to "... discredit and burden legitimate Federal regulations of interstate commerce ..." or "... to destroy rights arising out of the Federal statute which have accrued both to the Government and the shipper ...." In *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148 (1942), the Court upheld the preemptive effect of a federal statutory scheme governing the production of renovated butter. The Court said:

"It is said that the state and the United States have worked cooperatively in protecting consumers from vicious practices in the handling of processed butter; that any action by the state aids the policy of both in disposing of unfit food; and that therefore a harmonious federal-state relationship should not be hampered. . . . Nothing could be more fertile for discord, however, than a failure to define the boundaries of authority. Clashes may and should be minimized by mutual tolerance; but they are much less likely to happen when each knows the limits of its responsibility. And, it is only reasonable to assume that the theory of denying inconsistent powers to a state is based largely upon the benefits to the regulated industry of freedom from inconsistencies." 315 U.S. at 169.\*

\* In cases arising under the Commerce Clause, this Court has also recognized the unreasonable burden on interstate commerce that may result from inconsistent state requirements. In *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945), for example, the Court

By its nature, the regulation of interstate marketing of food demands a single uniform system of rules established by the federal government."

**B. The Federal Food, Drug, and Cosmetic Act and Regulations Issued under It Establish a Pervasive System of Federal Regulation That Leaves No Room for Supplementary Regulation by the States.**

This Court has often recognized that the existence of a pervasive system of federal regulation may evidence an intent to preempt the adoption of supplementary regulations by the states. *E.g.*, *City of Bur-*

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confronted an Arizona statute limiting the length of trains passing through the state. The purpose of the statute was to reduce accidents. The Court invalidated the statute and stated:

"If one state may regulate train lengths, so may all the others, and they need not prescribe the same maximum limitation. The practical effect of such regulation is to control train operations beyond the boundaries of the state exacting it. . . . The serious impediment to the free flow of commerce by the local regulation of train lengths and the practical necessity that such regulation, if any, must be prescribed by a single body having nation-wide authority are apparent." 325 U.S. at 775.

\* This Court has recently recognized that "it is implicit in the regulatory scheme, not spelled out in *haec verba*," that FDA is an "expert agency" endowed by Congress with "primary jurisdiction" over the "technical and scientific" matters involved in administration of the Act because they are within its "peculiar expertise." This recognition was in large part based upon the Court's determination that a contrary decision "would seriously impair FDA's ability to discharge the responsibilities placed upon it by Congress." *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 627 (1973); *CIBA Corp v. Weinberger*, 412 U.S. 640, 643-644 (1973); *Weinberger v. Bentex Pharmaceuticals, Inc.*, 412 U.S. 645, 653-654 (1973). FDA's role as the expert agency primarily responsible for the resolution of questions within its jurisdiction cannot be carried out if other agencies, at the federal or state level, are permitted to second-guess the policy decisions it makes.



*bank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973); *Pennsylvania v. Nelson*, 350 U.S. 497, 502-504 (1956); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 241-244 (1959). The Federal Food, Drug, and Cosmetic Act and the regulations issued under it establish such a system.

Early federal statutes concerning food labeling and marketing were directed to particular practices and abuses. Statutes enacted in the 1880's and 1890's (often in the form of restrictive revenue measures), for example, regulated the labeling and composition of substitute or imitation foods, such as oleomargarine<sup>10</sup> and filled cheese,<sup>11</sup> that could be palmed off as traditional foodstuffs.

The first general statute—the Food and Drugs Act of 1906<sup>12</sup>—established an essentially “negative” regulatory scheme. It prohibited various forms of adulteration and misbranding, but it required few affirmative disclosures and left regulatory officials little authority to establish such requirements through regulations. The 1906 Act, for example, did not require complete ingredient listings for most foods. *See Savage v. Jones*, 225 U.S. 501 (1912). The Secretary of Agriculture had no authority to establish standards of identity for foods or to fix the minimum quantity or quality of ingredients expected by consumers.

The 1938 Act represented a major shift in emphasis from the 1906 Act. The Commissioner of Food explained this shift during the 1935 House hearings on the legislation:

<sup>10</sup> Act of Aug. 2, 1886, ch. 840, 24 Stat. 209.

<sup>11</sup> Act of June 6, 1896, ch. 337, 29 Stat. 253.

<sup>12</sup> Act of June 30, 1906, ch. 3915, 34 Stat. 768.

“... The misbranding provisions of the [Food and Drugs Act of 1906] . . . are wholly negative in character; with the exception of the affirmative requirement that food in package form bear declaration of the net content, the misbranding provisions are in the nature of ‘don’t.’ They say you must not make a statement that is false or misleading, but they do not require you to make affirmatively a statement that is informing.

“The rule of caveat emptor applies. You can remain silent in every language of the universe. But if you do make a statement, the law requires it to be a truthful statement. A horse-trader’s code would provide that much.

“While that is entirely satisfactory so far as the negative misbranding provisions go—and we have sought to retain those provisions in S. 5, the Copeland bill—it is not sufficient to give to the consumer the information that the consumer is entitled to have about foods of the types and of the kinds that are to be found upon the market at the present time.

“So this bill, as I will undertake to point out with some particularity as we go through it, does offer requirements for affirmative labeling which will make possible the purchase more intelligently and therefore more discriminatingly of food and drug products.” Hearing Before a Subcommittee of the House Committee on Interstate and Foreign Commerce on H.R. 6906, H.R. 8805, H.R. 8941, and S. 5, 74th Cong., 1st Sess. 44-45 (1935).

This purpose has, indeed, been achieved. Beginning in 1938, FDA has established numerous labeling requirements for all food products marketed in commerce.



In recognition of its congressional mandate to establish a nationwide food labeling policy, FDA announced in January 1973 "the most significant change in food labeling practices since food labeling began."<sup>13</sup> In the Federal Registers of January 19,<sup>14</sup> March 14,<sup>15</sup> August 2, 1973,<sup>16</sup> and June 14, 1974,<sup>17</sup> alone it issued a total of 143 pages of proposed and final food labeling requirements and explanatory information. Other requirements have since been published.

It is not feasible to list all of the current food labeling requirements promulgated by FDA. They comprise some 278 pages in the 1976 edition of the Code of Federal Regulations, and blanket all aspects of the labeling of food products shipped in commerce today. These requirements include:

1. Procedures for requesting variations and exemptions from required label statements. 21 C.F.R. § 1.1a.
2. Definitions of the term "package" and general rules governing the placement and conspicuousness of mandatory label information. 21 C.F.R. § 1.1b.
3. Specific exemptions from required label statements. 21 C.F.R. § 1.1c.
4. Rules governing "cents-off" and other savings representations. 21 C.F.R. §§ 1.1d, 1.1e.

<sup>13</sup> FDA Press Release 73-2 (January 17, 1973).

<sup>14</sup> 38 Fed. Reg. 2124-2164.

<sup>15</sup> 38 Fed. Reg. 6950-6974.

<sup>16</sup> 38 Fed. Reg. 20702-20750.

<sup>17</sup> 39 Fed. Reg. 20878-20908.

5. Definitions of "label" and "labeling." 21 C.F.R. § 1.2.

6. Rules governing the failure to reveal material facts in labeling. 21 C.F.R. § 1.3.

7. Definition of the term "principal display panel." 21 C.F.R. § 1.7.

8. Rules governing the form, prominence, and placement of identity statements for foods. 21 C.F.R. § 1.8.

9. Rules governing the form and conspicuousness of the label declaration of the manufacturer, packer, or distributor of a food. 21 C.F.R. § 1.8a.

10. Rules governing the placement, conspicuousness, format, and accuracy of net quantity of contents declarations. 21 C.F.R. § 1.8b.

11. Rules governing the declaration of the number of servings contained in a food package. 21 C.F.R. § 1.8c.

12. Rules establishing an information panel for the placement of required label declarations, governing the format of the panel, and setting minimum type-sizes (with exemptions and special provisions for several kinds of foods). 21 C.F.R. § 1.8d.

13. General rules governing the prominence of required label information and the languages in which it must appear. 21 C.F.R. § 1.9.

14. Rules governing the label declaration of standardized foods used as ingredients in other foods and the designation of specific kinds of foods in ingredient listings. 21 C.F.R. § 1.10.

15. Exemptions from required label statements for incidental additives, assortments of different foods,

foods repackaged in retail establishments, foods shipped in bulk from one plant to another for further processing, and certain specific kinds of foods. 21 C.F.R. § 1.10a.

16. Rules governing the label declaration of spices, flavorings, colorings, and chemical preservatives. 21 C.F.R. § 1.12.

17. Warning statements for labels for food containers. 21 C.F.R. § 1.13.

18. Rules setting forth specific representations that render foods misbranded. 21 C.F.R. § 1.15.

19. Special rules for collective label names for ingredients of animal feeds. 21 C.F.R. § 1.16.

20. Rules establishing a uniform format for nutrition labeling, setting conditions under which it is required, and establishing standards for determining its accuracy. 21 C.F.R. § 1.17.

21. Rules governing the format and content of label statements concerning the cholesterol, fat, and fatty acid content of foods. 21 C.F.R. § 1.18.

22. Statements of policy and interpretation concerning numerous specific food labeling questions, such as the labeling of margarine, the declaration of quantity of contents on labels for canned oysters, label declaration of D-erythroascorbic acid, label statements for salt and iodized salt, and labeling of kosher and kosher-style foods. 21 C.F.R. Part 3.

23. Standards of quality and required label statements for certain foods. 21 C.F.R. Part 11.

24. Definitions and standards of identity for foods, comprising 24 broad varieties of food. 21 C.F.R. Parts 14-80.

25. Nutritional quality guidelines for foods, including required label statements. 21 C.F.R. Part 100.

26. General principles governing common or usual names for foods not subject to standards of identity, including rules governing the format and typesize of identity statements and the declaration of the percentage by weight of certain ingredients and regulations establishing common or usual names for certain specific foods or classes of foods. 21 C.F.R. Part 102.

27. Rules governing label statements for special dietary foods, including foods for infant use, vitamins and minerals, foods for control of body weight or management of disease, and hypoallergenic foods. 21 C.F.R. Part 125.

One can appreciate the detail of the FDA regulations only by reading them. They establish a comprehensive and interrelated system of rules that affects every aspect of the labeling and composition of food. It is inconceivable that a state can pick and choose among the rules that make up this pervasive federal scheme, or formulate different approaches to one or another of the many problems they address, without interfering with the purpose of federal law.

The FDA regulations have, moreover, been developed in accordance with the procedural safeguards guaranteed by the Administrative Procedure Act, 5 U.S.C. §§ 551-706, which assure public participation. Although the Grocery Manufacturers of America has not always agreed with these regulations, it has recognized that the FDA has made a major attempt to harmonize its various food labeling requirements, to establish a consistent rationale that will be applied to all such requirements, and to approach food labeling on a sys-



tematic, rather than ad hoc, basis. This is in substantial contrast to state food labeling requirements, which can be adopted quickly by local jurisdictions without national public notice or regard for the requirements of other jurisdictions.

The pervasiveness of the federal system governing food labeling leaves no room for supplementation by state requirements. State requirements different from or in addition to those imposed under federal law must be declared invalid.

**C. Decisions Concerning the Preemptive Effect of the Food and Drugs Act of 1906 Were Based on the Limited Jurisdictional Provisions and the Narrow Coverage of That Act and Do Not Determine the Preemptive Effect of the Federal Food, Drug, and Cosmetic Act of 1938.**

Several decisions of this Court under the Food and Drugs Act of 1906 upheld state regulations imposing on foods held for sale within their jurisdictions requirements different from or in addition to those imposed by the federal government. With but one exception, however, those decisions were governed by legal considerations that are irrelevant to the determination whether the Federal Food, Drug, and Cosmetic Act of 1938 preempts state laws that purport to impose labeling requirements different from or in addition to those imposed under the federal law.

In several of the decisions, the Court upheld state requirements that applied only to foods held for retail sale and not contained in original unbroken packages that had been shipped in interstate commerce. *Hebe Co. v. Shaw*, 248 U.S. 297 (1919); *Weigle v. Curtice Brothers Co.*, 248 U.S. 285 (1919); *Armour & Co. v. North Dakota*, 240 U.S. 510 (1916); *Price v.*

*Illinois*, 238 U.S. 446 (1915). These decisions were based in part on the jurisdictional provisions of the 1906 Act (which reached only goods that remained "unloaded, unsold, or in original unbroken packages" after interstate shipment<sup>15</sup>) and on the limited concept of the Commerce power from which those provisions were derived. See *Brown v. Maryland*, 12 Wheat. (25 U.S.) 419 (1827); *United States v. Great Atlantic & Pacific Tea Co.*, 92 F.2d 610 (1937). That jurisdictional limitation was eliminated in the 1938 Act.

Two of this Court's decisions were based on the limited scope and coverage of the substantive provisions of the 1906 Act. *Corn Products Refining Co. v. Eddy*, 249 U.S. 427 (1919); *Savage v. Jones*, 225 U.S. 501 (1912). In *Savage*, a state statute required ingredient listings to appear on the labels of animal feeds sold within the state. In *Corn Products*, a special state regulation required a blend of corn syrup, molasses, and sorghum to bear a label declaring the percentage of each ingredient. The Food and Drugs Act of 1906 prohibited false or misleading label statements, but it did not require ingredient declarations (except for certain specified ingredients, such as morphine, cocaine, and opium). In both cases, the Court concluded that the federal regulatory scheme did not "cover the entire ground." 249 U.S. at 427, 225 U.S. at 532. As the Court said in *Savage v. Jones*:

"... It is one thing to make a false or misleading statement regarding the article or its ingredients, and it may be quite another to give no information as to what the ingredients are.

...

<sup>15</sup> Act of June 30, 1906, ch. 3915, 34 Stat. 768, sec. 10.



"Congress has thus limited the scope of its prohibitions. It has not included that at which the Indiana statute aims. . . ." 225 U.S. at 532.

In *McDermott v. Wisconsin*, 228 U.S. 115 (1913), the Court invalidated a state regulation that affected an aspect of food labeling that was affirmatively regulated by the 1906 Act. Both federal and state law required the food in question (a blend of corn and cane syrups) to bear an identity statement. The federal law did not specify the words to be used in such a statement. The state, however, imposed a specific form of words to be used and prohibited all others.<sup>19</sup> The Court's decision cannot be explained as an example of irreconcilable conflict between state and federal law, since the labeling requirement imposed by state law was also permitted under the federal statute. The Court said:

" . . . Conceding to the State the authority to make regulations consistent with the Federal law for the further protection of its citizens against impure and misbranded food and drugs, we think to permit such regulation as is embodied in this statute is to permit a State to discredit and burden legitimate Federal regulations of interstate commerce, to destroy rights arising out of the Federal statute which have accrued both to the Government and the shipper, and to impair the effect of a Federal law which has been enacted under the Constitutional power of Congress over the subject." 228 U.S. at 133-134.

<sup>19</sup> Section 8 of the Food and Drugs Act of 1906 provided that "mixtures" or "compounds" would not be deemed misbranded if sold under "distinctive names." Act of June 30, 1906, ch. 3915, 34 Stat. 768, sec. 8. The state statute applied to "mixtures" of certain syrups, but prescribed specific names under which they were to be sold. 228 U.S. at 125-126.

The *Savage* and *Corn Products* decisions thus rested on a determination that the 1906 Act did not "cover the entire field" of food labeling, and that states remained free to regulate those aspects of food labeling not touched on by the federal law. The *McDermott* decision recognized, however, that, as to those aspects of food labeling for which the federal statute established an affirmative regulatory scheme, it left no room for supplementary state requirements, even though they might not conflict irreconcilably with requirements imposed under federal law.

As noted above (at pp. 28-34), the 1938 Act represented a major departure from the essentially "negative" regulatory scheme adopted by the 1906 Act. The 1938 Act established the basis for a comprehensive system of federal regulations that "cover the entire ground" of food labeling. No "gaps" remain for supplementary state regulations that do not in some manner interfere with the federal system.<sup>20</sup>

<sup>20</sup> It is significant that the 1938 Act and the regulations issued under it have eliminated the "gaps" in federal regulation specifically identified in the *Savage* and *Corn Products* cases. Sections 403(g) and (i) of the Act, 21 U.S.C. §§ 343(g), (i), require food labels to bear ingredient declarations, and FDA regulations deal in minute detail with the content and format of those declarations. E.g., 21 C.F.R. §§ 1.10, 1.10a, 3.88. The standard of identity for "table syrups" (which encompasses the product considered in the *Corn Products* case) requires a label declaration of the percentage of syrup ingredients under specified conditions. 21 C.F.R. § 30.1 (d)(3).

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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